OBSERVATIONS

Upon the 28. Act, 23. Parl.

K. JAMES VI.

AGAINST

Dispositions made in defraud of Creditors, &c.

Sr Georg Mackenzie

By Sir *George Mckenzie* of *Rosehaugh*.

Robert Lawrie anno 1675

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THE PREFACE.

THE easiest and plainest part of our Law, are our Statutes: for these are by Printing exposed to all mens view, and are drawn to instruct the vulgar in what they must obey. And this Statute against Bankrupts, must be presumed to be amongst the easiest and most intelligible; because it is founded upon the evident principles of equity, and reason,

reason, and was first drawn by the Lords of Session, and after some years trial, was renewed by the Parliament, who would have plain'd what was obscure, and supplied what was defective: And yet I am afraid that albeit the Statute be very full, and my Observations upon it be very clear, that yet it will appear convincingly that the knowledge of the Law is not easie, and that none should pretend to it, but such as have illuminated their excellent natural parts with laborious Learning, and have polish'd that Learning by a long Experience.

I have not debated fully the cases here related, that being fitter for Pleading then Treatises; nor have I set down all the cases that occurred, lest the Reader should think I industriously designed to confound him, the more to magnifie the necessity of Lawyers. It cannot be denyed but many now in my condition could have treated this Subject, both more profoundly, and delicatly, but yet I may say that nothing here is against Law, since all these Sheets have had the approbation of one of the ablest Lawyers

in our Nation, who can neither deceive, nor be deceived in his own profession.

These Sheets are but a part of a greater work, wherein I resolve to clear, 1. *What Acts are in desuetude, or abrogated.* 2. *How each Act is interpreted by the Lords decisions.* 3. *What new doubts may arise from each Act, though not yet decided.* 4. *Wherein our Statutes agree with the Civil Law, or Laws of other Nations. And thus I hope to make all our Acts of Parliament intelligible and plain.*

AN

AN EXPLICATION OF THE Act of Parliament, 1621. AGAINST *BANKRUPTS.*

The words of the Rubrick, or Inscription of this Act, are,

A Ratification *of the Act of the Lords of Council and Session, made in* July, 1620. *against unlawful Dispositions and Alienations, made by Dyvours and Bankrupts.*

FOr the better understanding of the Inscripon or Rubrick, it is fit to know, that the word *Bankrupt*, which is the translation of the Latine *Banciruptor*, is in the Original but a barbarous word, either derived from the French word *Banque*, or the Italian *Banco*, and the word *rumpere*:

becauſe when Merchands became Bankrupts, they broke, either the ſeat upon which they did ſit; or the bank or table, at which they did ſit, as *Salmaſ.* obſerves, in *Pref. de uſur. pag.* 511. But now the word *Banciruptor*, is taken not only, *pro menſulario; foro cedente*, but for any Merchand, or any other perſon, who has contracted more debt, then he is able to pay, as *Vegnern* obſerves. *pag* 8. They are called likewiſe *decoctores*, *quia rem ſuam coquendo diminuunt*, *decoquere* ſignifying *diminuere*, *Bud. ad l. ſi hominem* §. *quoties ff. depoſit.* In Italy they are called *falliti*, *& ceſſantes*, *Boer. deciſ.* 215. but in the Civil Law the true Latine word is *fraudatores*; *l.* 4. *ff. de curat. bon. dand.*

They are likewiſe by this Rubrick called *Dyvour*, *or Dyour*; from the Iriſh word *Dyer*, as I conceive, which ſignifies a knave, and they are likewiſe called *bairman* in our Law, *l. burg. cap. bairman.* 144. *& de jud. cap. bairman* 46. Though our learned *Skeen* does in *de verb ſignif. verb.* Dyvour, make Bankrupt to be the ſame with him who has obtained a *ceſſio bonorum*, *& qui bonis ceſſit*: yet theſe differ very much

much, for a Bankrupt is he only, *qui foro ceſsit, ſed qui bonis ceſsit, forum retinet, & bona creditoribus in ſolutum dedit*, *Hottoman. de verb. ſig. verb. credere, cadere foro eſt facti, cadere bonis eſt juris*, and he only who has loſt his eſtate by accident, without his own fault, was allowed *bonis cadere, bancciruptor dicitur, qui dolo caſuve non ſolvendo factus eſt.* Venger. *ibid.* How the word Banckrupt is taken in this Act, may be juſtly doubted, for by the Rubrick of the Act, it would appear, that this Act ſtrickes only againſt diſpoſitions which are made by perſons inſolvent, and whoſe eſtate is not able to pay the debt due to the reducer; for the Rubrick of the Act beares, to be againſt diſpoſitions made by *Bankrupts* or Dyvours; ſo that theſe two, are made *pares terminis*; and therefore, ſince a Dyvour is a perſon who is inſolvent; it ſeems that this Act muſt only ſtrike againſt Diſpoſitions made by perſons that are inſolvent, *per argumentum à rubro ad nigrum*: for Lawyers are very clear, that where either the Rubrick is an intire ſentence, or where any term uſed in the Rubrick, is explained

by any equipolent, or exegetick word, that there the general term which is dubious, is to be interpret according to the import of both these terms; and therefore, since the word Dyvour is only applicable to persons insolvent, the word Bankrupt must be likewise interpret only of these; and so the Rubrick running only against Dispositions made by persons that are insolvent, it must follow, that only such deeds are reduceable, as are done to the prejudice of Creditors by a person that is insolvent. 2. This seems likewise consonant to reason; for if the Creditor can recover his debt, he is not prejudged, and so the design of the Act fails; and it were most unreasonable to trouble a person who has got a Disposition, except there be an absolute necessity. 3. This is most suitable to the common principles of Law, whereby *nunquam recurrendum ad remedium extraordinarium, quamdiu locus est ordinario*, no more then in Physick, a member should be cut off where it can be cured; and therefore, a Creditor who may recover payment by ordinary diligences, such as by the comprysing,

sing, or arresting his Debitors Estate, ought not to be allowed to reduce all Dispositions made by his Debtor, since *omnes actiones rescissoriæ*, and particularly *actio Pauliana, sunt remedia extraordinariæ*, whereby the Magistrate has been by cheats of Debtors, and the fraudulent Dispositions of such as contract with them, forced to rescind and annull the private pactions of parties, contrary to the ordinar and general principles. 4. This seems to be further clear, by the narrative of the Act, which runs only against dispositions which elude all execution of justice, whereby Creditors are defrauded of all payment, and many honest families come to utter ruine; neither of which expressions are applicable to the case of Creditors, who may recover payment otherwise. Conform to which arguments, I find, that the Lords, upon the 6. of *March.* 1632. in an Action at the Laird of *Garthlands* instance, *contra* Sir *James Ker*, upon this Act of Parliament did refuse to reduce an Infeftment; albeit a meer Donation, and made likewise by the Grand-father to his own Grand-child, and that because the granter

of the Infeftment was neither at the time of the granting thereof *Bankrupt*, and *non ſolvendo*, nor was he become ſuch ſince; neither had the Creditor done diligence for his debt; and yet it might have ſeem'd in reaſon, that though diſpoſitions, where there was an onerous cauſe, might have been ſuſtained, there was no reaſon to allow the ſame priviledge in favours of confident perſons, for meer Donations. And upon the 10. *February*, 1665. the Lord *Loure*, having quarrel'd the Lady *Craigs* Infeftment, as being an additional Joynter, granted betwixt Husband and Wife, to his prejudice who was a Creditor, and had compriſed the Eſtate; It was anſwered, that the diſponer was neither *bankrupt*, nor *inſolvendo*, nor did the Compriſer ſuſtain any prejudice, ſeing the Lady was content, that the Lord *Loure* ſhould be preferred to his Annual-rents by vertue of his Compryſing, providing he would aſſign the Lady to his Compriſing *pro tanto*, that ſhe might recover as much for ſatisfaction of her additional Joynter; which anſwer the Lords found relevant, the Appriſers prejudice being purged, as

ſaid

ſaid is: but they ordained the Compriſer, not only to be admitted to have acceſs to the compriſed Lands, by aſſignation in manner forſaid, during the Legal, but they likewiſe declared, that if the Lady redeemed not within the Legal, the Lands ſhould be irredeemable, and the Lady ſhould be totally excluded; which though it was but a tryſting Interloquetor, do's confirm the former opinion. And though it may be alleadged, that a Diſpoſition being once valid, when it was firſt granted, cannot become thereafter null by the diſponers becoming thereafter inſolvent, yet this holds not in many caſes in our Law; for we find, that Diſpoſitions of leſs then the half of Ward-Lands, without conſent of the Superiour, become thereafter null, if as much of that Barrony be thereafter diſponed, as will amout to more than the half; But in my opinion, though the rubrick of our Statutes may found a preſumptive argument for explicating the Text; yet it is not authoritative, for the Rubrick is not read in Parliament, and it is added to the Law, after it is paſt, careleſly without debate.

Our Soveraign Lord, with advice and consent of the Estates: The legislative power of *Scotland* consists in the Parliament, that is to say, the King and three Estates of Parliament; and though some think it more proper in our Law to say, *Our Soveraign Lord, and Estates of Parliament*, as in all the Statutes, or Acts of the 18. *Par. Ja: 6*: then to say, *Our Soveraign Lord, with advice and consent*, &c. yet I conceive, the King Statutes, and they but consent, (though their consent be necessary) for his touching them with the Scepter, and not the being voted, makes them Laws; and in *England*, the King statutes with consent of Parliament, and upon their supplication, and therefore I understand not *Craig.* who *Diag.* 8. affirms Statutes to be *constitutiones trium Regni ordinum, cum consensu Principis*: for that is just to invert the statutory words of this, and many other Acts. Our old Acts being all past the last day of the Parliament, did not express the statuting power in every Act; for in effect they were all but branches of one Act, and run, *Item that*, &c. and many of these Acts bear, *It is sta-*

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tute by the Parliament, and the King forbids, as Acts. 13. 14. 1 *Par. Fa.* 1. which Intimats, that though the Parliament ſtatutes *ſuffragando & conſentiendo*, yet the King only doth ſtatute *ſanciendo, & prohibendo*. Sometimes our Acts bear, *It is ſtatute by the hail Parliament*; and ſometimes, *It is ſtatute and ordained*, without mentioning either King or Parliament; ſometimes alſo they bear the determination of Parliament, without ſpeaking of the King, which was either where the King was to perform what was ſtatuted, as 23. Act, *Par.* 1. *Fa.* 1. *It is ſtatute and ordained, that our Soveraign Lord ſhall gar mend his money.* And by the 6 Act, 3 *Par. Fa.* 2. *The Eſtates has concluded, that the King ſhall ride thorow the Realme*; or elſe when the Eſtates are only to grant what is ſtatuted, as in Commiſſions granted for uniting the two Kingdoms. But I find one Statute bear, the King ſtatuting without mentioning the Eſtates of Parliament, *viz.* Act 19. Seſſ. 1. *Par.* 1. *Ch.* 2. but this is but meer inadvertance.

Ratifies and confirms an Act of the Lords of Seſſion, &c. This was originally an

Act

Act past by the Lords of Session, when they do sit judicially, at which time it is marked in their books of *sederunt*, such and such men did sit. Thus the Hebrews designed the books of the Old Testament, by the first words; and thus we still mark the Laws from the first words; and thus the old books of our Law are called *Regiam Majestatem*, because they begin so.

His Majesty, at the first institution of the Colledge of Justice, did allow the Lords of Session *to conclude upon sick Rules, Statutes and Ordinances, as shall be thought by them expedient to be observed and keeped in their manner and order of proceeding, at all times, as they devise, conform to reason, equity and justice, his Grace shall ratifie and approve the same.* These are the words of the 43. Act, 5. Par. *Ja.* 5. to the which Act, I think this act relates: but it would appear, both by that Act, and by the power as here repeated, that the Lords of Session have only power to make orders relating to the regulation of their own house, and to the forms of Process. For this was indeed necessary for explication of their Jurisdiction, and possibly was implyed in

their

their very constitution, without any expresse warrand: *arg. l. 2. ff. de jurisdict.* but it seems that this general power cannot authorize them to make Statutes, and Acts relating to the material distribution of Justice; such as, that all Writs should be null, except subscribed before witnesses, though they might have ordained, that Papers under the hands of their own Clerks, should be so subscribed: for if they could make Statutes, as to any thing else besides the forms of their own house, there needed no Parliament; for their Statutes might bind all the people in all things; and yet it may be objected, that by this argument the Lords of Session could not have made this Law, declaring Contracts amongst the Leidges, to be null; that touching upon one of the fundamentals of humane society, albeit they might have declared such a nullity, receiveable by way of exception, for that concerned only form of Process. But the Answer to this is, that the Lords, in making this Act, did not introduce *jus novum*, a new Law; but only adapted to our practice, the old Roman or Civil Law, which

which they might have followed in their decisions, without making any new Act of *sederunt*, as they do in most cases where the Civil Law is founded upon equity; as here; and where they are not determined by either our former practice, or constitutions. And by the same principle, both the Lords of Session, and the Parliament did in this Statute declare, that their said Act should extend to causes depending, or to be intented: whereas Statues regularly are extended only to future cases; except where the Act declares what was Law formerly, as in this case.

We may then conclude these differences betwixt these Acts of *sederunt*, and Acts of Parliament, that Acts of *sederunt* can only be made concerning the formes of procedure, or to fix a constant decision for the future, in cases which they might have so decided, before their own Act: and it is their prudence, and our hapinesse, that they should rather decide in *hypothesi*, then in *thesi*. But Acts of Parliament should mainly be made to regulat new substantial grounds of justice and commerce.

But

But though this power of making orders for administration of justice, be properly, and principally their province; yet they have in this but a cumulative jurisdiction with the Parliament, who may and do likewise make such orders, but the Parliament ought to do so sparingly, since forms are better known to the Lords of Session, then to them: and therefore, it seems that the power of making Acts, relating to forms, or of regulating forms already made, belongs particularly to the Lords of Session, both because of their constitution, and experience. The Lords have been in use, not only to regulat their own Court by Acts of *sederunt*; but they have by the same power prescribed regulations to other Courts, and thus as to the Justice Court in *anno*, 1591. years, they made an Act, that women, and *socii criminis*, might be received witnesses, in cases of Treason: and we find, that they have likewise regulated inferiour Courts, without any previous warrand, as is clear by the 19. Act, 23. Par. *Ja.* 6. where the Parliament ratifies an Act of Secret Councel and Session, which did ordain

dain and command, that no Proceſs ſhould be granted before inferiour Judges, on the firſt Summonds, but upon lybelled Precepts, and citations of fifteen dayes warning. And in *anno*, 1636. they made an Act of *ſederunt*, appointing, that no conſent of any inferiour Court ſhould bind the conſenter, except it were ſubſcribed by himſelf, and that the aſſertion of the Clerk of that Court was not ſufficient. Nor ſhould this extention of their power ſeem unwarrantable; for, ſince they may reduce the Decreets of inferiour Courts, it ſeems moſt conſequential, that they may regulat their procedure: but though the Lords of the Seſſion paſs the Bills before the Juſtices, and advocat Cauſes from before that Court, it may ſeem ſtrange, that they ſhould have power to make Acts of *ſederunt*, for regulating that Court, the juriſdictions *Civil* and *Criminal*, being moſt diſtinct and different.

It may likewayes ſeem, both by the former Act allowing the Lords of the Seſſion this power, and the Ratification of their Statute ſpecified in this Act, that it is neceſſar, that all the Acts of *ſederunt*, which

which relate not meerly to the regulating their own forms, ſhould be ratified by the Parliament, though in the interim of Parliaments, theſe Acts ſhould bind. And yet, *de facto*, we ſee very many Acts of *ſederunt* to have full vigour, and force, without any ſuch confirmation.

Before I begin to explain the words of the Act of Parliament, I ſhall offer this Analyſis of it,

Either the Creditors who are defrauded, are ſuch Creditors as have done no diligence, or ſuch as have done diligence: if they be ſuch as have not done diligence, then either the Diſpoſitions quarrelled are made to conjunct perſons, or not; if they be made to conjunct, or confident perſons, either they are made for neceſſary and onerous cauſes, or not; if they be made for an neceſſary and onerous cauſe, they are valid, though made to conjunct or confident perſons. 2. If theſe Diſpoſitions be made without an onerous cauſe, then either they remain with the conjunct confident to whom they were made, or not; if they remain with him, they are reduceable, either by way of exception, or

reply

reply. But if any third party, no way partaker of the fraud, has lawfully purchaſt any of the Bankrupts Lands, for a juſt and true cauſe, then the Right is not quarrelable, but the Receiver is only lyable to make the ſame forthcoming to the Bankrupts true Creditors. 3. The fraud is probable by writ, or oath of the party receiver. 4. If the Creditors have done diligence by Inhibition, Horning, *&c.* Then the Bankrupt cannot in prejudice of theſe Creditors who have done diligence, diſpone voluntarily any part of his Eſtate to defraud that diligence, in favours of another concreditor, who has done no diligence, or poſterior diligence, or in favours of any interpoſed perſon to their behoof. And in this part of the Act, it is not conſidered, whether the interpoſed perſon be a perſon conjunct, or not. 5. The Bankrupts, the interpoſed perſons, and all ſuch as have aſſiſted them, in adviſing, or practiſing theſe frauds, are declared infamous.

Con-

Conform to the Civil and Canon Law, &c.

BEcause the Act of Parliament and Act of *sederunt* bear, that they have in this Act followed the Civil and Canon Law; We may justly assert that it were fit the Lords of Session understood exactly the Civil Law, and that it is the great foundation of our Laws and Forms. Thus we see, that *Robert Leslies* Heirs, are by the 89. Act, Parl. 6. K. *Ja.* 5. ordained to be forefaulted for the crime of treason committed by their Father, according to the Civil Law; and forfaulted in absence, was allow'd by the Lords of Session, in *Anno* 1669. because it was conform to the Civil Law: and falshood is ordained to be punished, according to the Civil and Canon Law, Act 22. Par. 5. Q. *M.* And that the Civil Law is our rule, where our own Statutes and Customs are silent, or deficient, is clear from our own Lawyers, as *Skeen, Annot. ad l.* 1. *R. M. c.* 7. *ver.* 2. and by *Craig, l.* 1. *Diag.* 2. As also from our own

Hiſtorians, *Leſlie, l. 1. cap. Leg. Scotor. Boet. l. 9. Hiſt. Camer. de Scot. Doctr. l. 2. cap. 4.* And the ſame is recorded of us by the Hiſtorians and Lawyers of other Nations; as *Forcat. lib. 7. de gal. imper. Polid. lib. 1. Hiſt. Angl. Petr. di amitis Geograph. Europ. tit. di Eſcoſſe*: and *Duck, de auth. jur. civ. lib. 2. cap. 10.* And though the Romans had ſome cuſtoms or forms peculiar to the genious of their own Nation: yet their Laws, in undecided caſes, are of univerſal uſe. And as *Boet.* well obſerves, *Leges Romanas à Juſtiniano collectas, tanta ratione & ſermonis venuſtate eſſe, ut nulla ſit natio tam fera vel ab humanitate abhorrens quæ eas non fuerit admirata.* And K. *Ja. 5.* was ſo much in love with the Civil Law, as *Boet.* obſerves, *lib. 17.* that he made an Act, that no man ſhould ſucceed to a great Eſtate in *Scotland*, who did not underſtand the Civil Law, and erected two profeſſions of it, one at St. *Andrews*, and another at *Aberdene*; and when K. *James* the ſecond did, by the 48. *Act, 3. Parliament*, ordain, that his Subjects ſhould be governed by no foraign Laws, he deſign'd not to deny the reſpect due to the Roman Laws,

Laws, but to obviat the vain pretences of the Pope, whose Canons and Concessions were obtruded upon the people, as Law, by the Church-men of these times.

It is also fit to know, that by the Civil Law many remedies were provided to secure Crditors against the cheats of their Debitors: As first, *Actio Pauliana*, so called either from *Paulus* the Prætor, who did introduce it, or from *Paulus* the Lawyer, who did first advise it: by which Action Creditors might recall either the Estate moveable, or immoveable, dispon'd by their Debitor to their prejudice. 2. *Actio in factum*, by which *bona incorporalia*, such as *jura*, & *servitutes* were recalled, when alienated, *l.* 14. *ff. qua in fraudem creditorum.* 3. *Actio faviana*, whereby Patrons might revoke that which was done by their freed men, to the prejudice of that fourth part or *legittim* which was due to them by the Law. 4. *Actio faviana utilis*, by which Minors who were adopted or arrogated, might revoke what was done in prejudice of their fourth part due to them. But though *Snedwine* calls this *utilis faviana*, yet it is a mistake; for *Hottoman*,

man, *Gomezius*, and others, do much more properly make this a *species actionis Calvisianæ* 5. *Actio Calvisiana*, which was granted indifferently to Patrons and others. 6. *Edictum fraudatorium*, which was competent, when the Creditor was to revoke what the Debitor had alienated, and which belonged to another, and not to himself: as if a Tutor had alienated the goods belonging to his Pupill, which Pupill, and not himself, was Debitor.

The Action competent by the Civil Law, was called *Actio revocatoria*, so called, because the Judge revoked what was done; and with us it is called an Action of Reduction, because the deeds so done are reduced or rescinded: And I find the word Reduction used by Civilians even in this sense, as by *Panormitan*, *Concilio secundo*, and others. And *reducere* does properly signifie *in formam pristinam instaurare*, as is clear by *Ulp. l. 3. ff. de Itin. act privato* §. 15 And therefore we have elegantly called this an Action of Reduction, because the Judge was to restore the thing alienated in prejudice of the Creditor to its former condition, whereas the Reduction of Decreets

was

was a term unknown to the Civil Law, they using only Appeals, and Reviſions; but Reductions of Sentences is uſed amongſt the Doctors, even in the ſame term and ſenſe that we uſe it, as is clear by *Gail. lib.* 1. *obſerv.* 141. *&* 150. And the reaſon why it was neceſſar for Lawyers to introduce the neceſſity of ſuch Reductions or Revocations, was, becauſe in the ſubtility of Law, the alienation did *ipſo jure transferre Dominum, l. ſi ſciens ff. de contra empt.* And therefore it is that if ſuch Reductions be not raiſed before the years of preſcription, the alienation it ſelf is valid, though within that time it might have been reſcinded by this Action of Reduction.

Though this Statute only declares all Alienations, Diſpoſitions, Aſſignations and Tranſlations whatſoever made by the Debitor, of any of his Lands, Teinds, Reverſions, Actions, Debts, or Goods whatſumever, to be null; yet this is extended to Bonds granted, and to Tacks ſet by the Debitor, to the prejudice of his Creditor, for though neither Tacks, nor Bands, be comprehended under the Letter of the

Law, yet the ſame parity of reaſon extends the Act to them; and in Laws which are founded upon the principles of reaſon, extenſions from the ſame principles are very natural, and in Laws which are introduced for obviating of cheats, extenſions are moſt neceſſary, becauſe the ſame ſubtile and fraudulent inclination which tempted the Debitor to cheat his Creditors, will eaſily tempt him likewiſe to cheat the Law, if the wiſdome and prudence of the Judge did not meet him where ever he turned. But yet Bands, in ſo far as they are perſonal, do not prejudge the Creditor, nor fall they under this Statute: but only in ſo far as they tend to, and may be the ground of legall Alienation, by Comprizing, Poynding, or other diligence to the prejudice of the Creditors, and by affecting the Debitors Eſtate. By the word *Alienation*, is meant not only an expreſs transferring of the right, but any act whereby the *dominium* or property is looſed to the Debitor, as if the Debitor ſhould in prejudice of his Creditor, *habere rem pro derelicto ut alius eam occupet*, if he ſhould relinquiſh any thing, upon deſign, that a conjunct or confident

fident perſon might poſſeſs it. Diſcharges likewiſe by the Debitor, of a right competent to him, are reduceable upon this Act of Parliament, though the word *Diſcharges* be not expreſt in the Act, for by the common Law, *Competebat Pauliana, quando Creditor liberabat Debitorem ſuum acceptilatione vel per pactum de non petendo.* Wherein *l.* 1. §. 2. *ff. h. t.* agrees with *l.* 5. *Baſil.* *η απεγοντος τι ποιησαι.*

I doubt not but upon the ſame parity of reaſon, if a Debitor ſuffered a Decreet to go againſt him, *doloſe*, and connived ſo far in prejudice of his Creditor, as to omit a competent defence; but the Creditor might reduce that Decreet upon this Act of Parliament, if he could inſtruct the connivance and colluſion, and verifie the defences that were omitted, but without this colluſion were clearly inſtructed, it were very hard to reduce a Decreet at the inſtance of a party, who needed not to have been called,

I likewiſe think, that if the Debitor ſhould in prejudice of his Creditor ſuffer the term to be circumduced againſt him for not compearing to depon, that Decreet were

were likewiſe reduceable: And this was ſo found at the inſtance of *Marjory Halyburton contra Moriſon*, where though *Moriſon* was a ſingular Succeſſor, and had got an Aſſignation to the Decreet obtained by colluſion againſt *Watte*, by his Brother, yet the Lords ordained Witneſſes before anſwer to be led for proving the colluſion, and repon'd *Watte* to his oath, and ordain'd him to depon. But the difficulty there would be, how a Debitor could be compelled to ſwear: and I doubt not but in this caſe if the colluſion were offered to be proven by the oath of him who obtained the Decreet, that the Decreet would be reduced, though the Debitor compeared not to depon: or if the Creditor purſu'd him, that *eo caſu* he would be forced to depon, and that if he refuſed, perſonal Action would be obtained againſt him, *l.* 3. §. 1. *h. t.* which allows Action to the Creditors, *Si data opera ad judicium non venerit.* ἢ ἐπίτηδες μὴ ἐλθὼν εἰς δικαστήριον.

Upon the ſame reaſon alſo, if my Debitor ſhould by colluſion prejudge his marches by a tranſaction, meerly to prejudge me who was to ſecure his Eſtate to my ſelf by

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a diligence for my debt; this transaction might be quarrel'd, as done in defraud of me his Creditor, which agrees with *l. 13. Basil. h. t.*

It is much debated amongst the Civilians, whether he is said to alienat in prejudice of his Creditors who refuses to acquire an Estate that he might acquire, to the advantage of his Creditors: As for instance, if he refused to accept of a Legacy, or to enter Heir, it would appear to me, that by the common Law, *Actio Pauliana* extends not to these cases, as is clear *per l. quod autem ff. quæ in fraud. qui autem cum posset aliquid quærere, non id agit, ut acquirat ad hoc edictum non pertinet & §. 2. proinde & qui repudiavit Hæreditatem vel Legittimam vel Testamentariam non est in eo casu ut huic edicto locum faciat.* And the ordinary distinction allow'd by the Doctors in this case is, that *aut agitur de jure delato & quæsito, & hoc debitum quæsitum Creditor repudiare non potest, aut agitur de jure non delato, aut saltem nondum quæsito licet delato, & non prohibetur illud repudiare.* But yet this decision of the Civil Law seems unreasonable, for since the Law was to se-

cure

cure Creditors, it was just that it should have secured them against all frauds, and what fraud is more malicious, then to ly out of an Estate by which the Creditor might be pay'd: or not to fulfil a condition, by the fulfilling whereof, they might be put in a capacity to pay their Debt. And therefore our Law has much more justly by the 106. Act, 7 *Par. Ja.* 5. allowed, that the Creditor may charge his Debitor to enter Heir, whereupon the Estate may be appriſed from the appearand Heir, in the same way, and manner, as if he had entred Heir.

As also, by our Law, if a Legacy were left to my Debitor, if he designed to ly out of it meerly to prejudge me, who am his Creditor; yet the Law would secure me against this malice, either by allowing me to arrest the Legacy left in the hands of the Executor, if the Executor did confirm that Testament wherein my Legacy was left, and so I might establish a right to the said Legacy in my own Person, by a Decreet to make forth-coming; or if the Executor should refuse or decline to confirm the Testament. I the Legators Creditor

ditor might confirm my ſelf *Executor*, *dative*; and ſo in *omnem eventum*, ſecure my ſelf againſt the fraud deſigned by my Debitor; but they are in a miſtake who think, that I could have confirmed my ſelf *Executor* to the Defunct, for the Defunct was not my Debitor, though he left a Legacy to my Debitor. The queſtion is yet harder with us, in conditional obligations, whereof I ſhall give two inſtances; one is, if by contract betwixt my Debitor and *Titius*, *Titius* were obliged to pay my Creditor 5000 merks; and upon the payment thereof, my Creditor were obliged to confirm *Titius* as his Vaſſel, but my Debitor finding that the ſaid 5000 merks would accreſs to me, ſhould upon that head decline to fulfil. The queſtion is, how could I ſettle in my own Perſon a right to the ſaid 5000 merks? And it is thought that the proper way were to compriſe from my Debitor, that right by which he could have confirmed *Titius*; and having thus put my ſelf in a condition to fulfil the condition upon which the 5000 merks was payable, I could either arreſt the money in *Titius* hand, and force him to

make

make it forth-coming, or else pursue an ordinary action against him, wherein I would conclude that he being obliged to pay 5000 merks to my Debitor, upon obtaining a confirmation from him, should be now decerned to pay me the said 5000 merks, as having come in place of his said Creditor, by having compriſed his right, and so being capable to pursue, and fulfil the condition whereupon the said 5000 merks was payable. But it is thought that the last part of the Alternative will not hold, *viz.* that there may be a personal Action for payment; and that because, albeit the Creditor having compriſed the right whereupon he may confirm, may fulfil the condition, yet he cannot have right to the conditional obligation, so that he may pursue for payment, unless it be setled in his Person by compriſing, arrestment, or some other legal diligence.

The second case is, if *Titius* be oblidg'd to pay my Debitor 5000 merks, upon condition that my Debitor should build him a House: The question is, how I, if my Debitor be unwilling to fulfil, can establish a right to the said sum in my own Person.

To

To which it may be answered, that either my Debitor was obliged expresly by way of mutual Contract, to build the said House to *Titius*: And then some think, that I may force *Titius* to assigne me to the Contract, and thereby I will force my Debitor to fulfil his part; but yet I see not how he may be forced to assigne me, or from what that obligation can be infer'd. Others think, that I may arrest, and if when I pursue to make forth-coming, *Titius* shall alledge that he cannot pay until the condition be fulfilled. I may eleid that allegeance by this reply, *viz. sibi imputet*, that he did not obtain the implement of that condition by registrating the Contract, and forcing my Debitor to fulfil. But I think the foresaid reply, *sibi imputet*, would not be relevant, seing the Debitor is secure; and it cannot be imputed to him that he did not pursue for implement, and as the Creditor of the conditional Debitor would not be heard to say *sibi imputet*, so this Creditor who can be in no better case; cannot reply upon *sibi imputet*.

But if my Debitor was not expresly obliged to build the said House, and that

Titius

Titius was only bound to pay 5000 merks, when my Debitor ſhould build him ſuch a Houſe. I conceive that *eo caſu*, if my ſaid Debitor deſigned to defraud me by not fulfilling the condition; our Law would allow me no remedy.

To be intented by any true Creditor.

A Creditor is he to whom we owe any thing, againſt which we cannot defend our ſelves by a perpetual exception. Δανιστης εστιν, ὁ ἐξ πασων αιτιας χωρις δυνηκοις παραγραφης χρησαμενος *Baſil. de verb ſignif. l.* 10.

By theſe words it clearly appears, that this Action is competent to all Creditors, whether they were Creditors for an onerous cauſe, or not. For though it would appear by the narrative, that this Law was only deſigned to ſecure ſuch as were Creditors for an onerous cauſe; and albeit it would ſeem that the only reaſon why that this Law was introduced, was wanting here; ſince the Creditor did not lend out of

his money in this case, in contemplation his his Debitors Estate: Yet since in the construction of Law, even donations are good Rights, and the person to whom they are made becomes thereby Creditor; *etiam donatarius est Creditor, post quam donatio est completa* (except in the case where the donation is revockable) therefore this Action is likewise competent to them; and so it has been oft decided in our Law.

Though Creditors whose term of payment is not come, differ from such whose Debt is suspended by some condition, the one being called *Creditor conditionalis*, and the other *Creditor in diem*; which two differ both by the Civil Law, and ours; yet whether either of them be comprehended under the general word Creditor, where that word is used in Statutes, is much debated. *Cagn. ad l. 1. ff. Si certum petetur* is of opinion, that these are not true Creditors, because a Debitor is he who may be forced to pay, *l. Debitor: ff. de verb. sign.* with which Law the *Basilicks* do agree, for *l. 66. tit. Basil. de Reg. jur.* ὁ δίκαιον ἔχων παραιτήσαι οὐκ ἔστι χρεώστης, but so it is that he who

who owes to a day, or under a condition cannot be forced to pay. 2. The Law called a conditional debt, the hoop only of a debt. *Ex conditionali just. de verb. obl.* 3. These are called Creditors in this title *quibus ex quacunque causa cum debitore est actio*, but so it is that before the condition be purified, or the term of payment, there can be no Action, *l. cadere diem, & l. Creditores: ff. de verb. signif.* But yet on the other hand, these are both Creditors, because the Law makes Creditor to be *genus*, the *species* whereof is *Creditor purus*, *Creditor in diem*, & *Creditor sub conditione*, *l. Creditores ff. de verb. signif.* 2. It is clear *per l. Aquil. ff. ad l. Aquil.* that a conditional Creditor may pursue to have his Debt payed, or secured, when the Term comes, though it be not yet come. 3. *Ille vere est Creditor, qui perpetua exceptione non potest removeri, l. creditores, ff. de verb. sig.* But so it is, that neither Creditor *in diem*, nor Creditor *sub conditione*, *potest perpetua exceptione removeri.* 4 In Reason it appears, that since when the condition is purified, the condition is drawn back to the date of the Contract; that

therefore

therefore the conditional Creditor hath this remedy competent to him, *glos in d. §. si quis in fraudem.*

This Action then, is competent to Creditors, to whom a Debt is conditionally owing; but is not to take effect until the condition be purified. As for instance, if *Titius* sell me his Lands with absolute warrandice, and thereafter dispone any part of his Estate, to a conjunct, or confident person, without an onerous cause, I might reduce that alienation as done in defraud of me, though the Lands sold to me were not evicted, and so the warrandice did not actually take place. Which case though it be not expressly decided in our Law, yet I find a reduction *ex capite inhibitionis* sustained in thir very terms, but with this just caution, *viz.* that the reduction should take no place till distress should follow, which is likewise decided by the Civil Law, *l. Potior ff. qui potiores in pig.* §. 1 where also the former caution is used, *& ubi conditio purificata est, ibi conditio retrotrahitur.* 30. This Action is even competent to these Creditors whose term of payment is not come, though it may seem,

that till then they are not true Creditors, The reason why both the Civil Law, and ours allow reductions in these cases, is commonly thought to be, least the Creditor to whom the alienation is made, become *insolvendo*, and so the action of reduction, if delayed till then, would then become useless. But if the Lands or others disponed, be still in their hands, it does not import whether they be insolvent or not, seing reductions are *in rem*, and doe affect the right disponed, whatever be the condition of the person who receiveth the right; and if they be dispon'd to a third person for an onerous cause, the reduction cannot be effectual; and for obviating that prejudice, the Creditor may inhibite. The true reason then for sustaining Reductions at the instance of Creditors *in diem*, or *sub conditione*, is, that though personal actions for payment, are not competent to such Creditors before the day, or the condition exist, yet they may obtain Declarator, that notwithstanding of such fraudulent rights, their Bonds shall be effectual to them, and their Debitors Estates liable to them, and to execution at their instance, as if those

Rights

Rights were not granted, and upon the matter, Reductions are nothing els but Declarators to the effect foresaid. 4. By the common Law, such as were Creditors *ex delicto*, had this remedy, which though some Lawyers have contradicted, yet it is most clear in my opinion; *l.* 12. *ff. de verb. sig. sed etsi ex delicto debeatur, mihi videtur posse creditoris loco accipi:* for though he only is a Creditor, whose faith we have followed, *l.* 1. *ff. si certum petat:* and that the party injured cannot be said to have followed the faith of the injurer, yet that Law expresses only one quality of a Creditor; and there are many Creditors whose faith we have not followed. And yet I have seen this debated in our Law, *February* 1674. *Lindsay* contra *Gray* of *Haystoun*, in which persuit a Reduction was raised by *Lindsay* against *Haystoun*, of a Disposition made to *Haystoun* by him who had murdered her Husband, after the murder committed, to the prejudice of the assythment due to her, and thereafter decerned to her by the Exchequer: from which Reduction the Lords assoilzied, because *Haystoun* was not obliged in Law to know of the

murder, nor did any Regiſter put him in *mala fide*, and ſingular Succeſſors are only obliged to ſeek the Regiſters; and ſhe having only the gift of the murderers eſcheet (he being denounced in abſence) for ſatisfaction of the aſſythment due to her; the Lords found ſhe might purſue Declaratours of Eſcheet, but could not purſue real Actions.

And generally with us in *Scotland*, he who commits a crime, is either only denounced fugitive, and in that caſe, his Eſcheet only falls, or he gets a remiſſion, and then there is an aſſythment due, but in neither of theſe caſes Reductions upon this Statute are ſuſtained, or elſe the murderer dies, and then nothing is due even by way of aſſythment with us. But this firſt ſeems unreaſonable, or at leaſt ſevere, for if a perſon ſhould commit a crime againſt me, and ſhould thereafter to defraud me of that aſſythment, and juſt reparation that were due to me, diſpon his eſtate to a conjunct or confident perſon; It ſeems very unjuſt that I ſhould be diſapointed of my juſt ſatisfaction by this voluntar deed of his.

And

And as this is not ſuitable to the principles of equity, and juſtice; ſo neither ſeems it ſuitable to the Principles of Law, for *tantum facit quis delinquendo, quantum facit ſe obligando*, and therefore as I could have reduced any ſuch voluntar Alienation, if another had expreſly oblidged himſelf to me, ſo ought I to have the ſame benefit when another has committed a cryme againſt me: And if we conſider ſeriouſly the principles of either the Civil, or our Municipal Law; we will find; that not only are Creditors *ex dilicto* looked upon as Creditors, but that they have προτοπραξίαν, or *jus prelationis* to all other Creditors, in ſwa far as concerns the neceſſary reparations. And thus it is with us expreſly declared by the 25. Act 14. Par. K. *Ja.* 2. and the 174. act 13. Par. *Ja.* 6. that all remiſſions, or reſpits granted to any perſon till the party skaithed be firſt ſatisfied, ſhall be null. And by the 26. Act. 1 Par. *Ch.* 2. the party from whom goods are ſtollen, are to have reparation out of the firſt, and readieſt of the thiefs goods And the laſt part, *viz.* that nothing is due by way of aſſythment where the guilty

perſon ſuffers, ſeems unreaſonable for the Heirs of the perſon injured being put to great expenſes in the perſuite oft times, and the wife, and children, being oft times beggar'd by the death of the perſon killed, it is unjuſt they ſhould have no reparation; and the offenders death ſatisfies publick juſtice, but not them. And I love better the Law's of *Spain* and *France*, which allow's reparation even where the offender dyes.

For the better underſtanding of the general point, how far the Fisk becomes a Creditor, by the common Law, upon the Commiſſion of a cryme, and ſo may reduce poſterior diſpoſitions; It will be fit to deſtinguiſh theſe caſes, firſt, before the cryme be committed, the Fisk has no intereſt to reduce any Diſpoſition made by any perſon whatſoever, except the Commmitter had diſponed his Eſtate, upon diſigne to diſapoint the Fisk when the cryme ſhould be Committed; As for inſtrance, if a perſon who diſigned to run in to the enemy, or to Kill the King, ſhould immediatly before diſpon his Eſtate, I conceive that diſpoſition would be quarrelable, as done in

fraudem

fraudem fiſci. If this *animus committendi crimen, & fraudandi fiſcum*, could be made appear, by theſe, or ſuch like preſumptions, *viz.* If the diſponer did immediatly before the committing of the cryme, and without any Onerous cauſe, grant the ſaid Diſpoſition, and made an Diſpoſition *omnium bonorum*, for a particular Diſpoſition of any ſmall part, though made immediatly before. and though *gratuitous*, could hardly be quarrelable *ex hoc capite.* 2. If the receiver of the Diſpoſition was conſcious to the diſponers deſigne of committing the cryme, then if the cryme was treaſon, the receiver is guilty of the cryme; and ſo the Diſpoſition, and all the receivers own Eſtate fals to the Fisk. And in theſe crymes a Diſpoſition made to one who was conſcious to the deſigne, makes the diſpoſition quarrelable whether it be made for an onerous cauſe, or not, or whether it be *omnium bonorum*, or not. 3. As to Diſpoſitions made after the cryme is committed, we muſt diſtinguiſh thus, *viz.* either the cryme committed is treaſon, and all diſpoſitions made after the perpetuating of this cryme are null, though before citation, or condemnation, but there muſt ſtil

ſtill enſue a ſentence, which ſentence is drawn back to the committing of the cryme. 4. In other crymes, Diſpoſitions are either of Heretage, or Moveables; As to Heretage, no diſpoſition is quarrelable, becauſe no cryme confiſcats Heritage, except treaſon. And yet *quoad* aſſythments to the party wronged, I think there is in reaſon (though our Law allows it not) ſo far *jus quæſitum*, to them, that they may quarrel all gratuitous Diſpoſitions, though made before citation, as made to their prejudice, who became lawful Creditors by the injury ſuffered in the ſame cryme: but if the Diſpoſition was for an onerous cauſe, I conceive it cannot be reduced *ex hoc capite*, or affected with the ſubſequent aſſythment becauſe the buyer was *in bona fide* to buy, finding nothing againſt him in the Regiſter of Hornings, or Inhibitions. And that though he knew the Diſponer had committed the cryme, becauſe he was not oblidged thereby to know that he was incapacitated in Law to diſpon. 5. In other crymes, beſides treaſon, Diſpoſitions of Moveables are quarrelable by the Fiſk, if if made after ſentence, and it may be, it af-

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ter the party was cited for the crime, if the crime was such as did confiscate Moveables. For though *regulariter post commissum crimen, valet alienatio ante sententiam facta titulo oneroso neque revocatur nisi appareat contrahentium fraus. Angel. Ad. l. 1. Siquis C. de bon. proscript.* yet there lies still a presumption, that all Dispositions made after an accusation are made *me tu justæ penæ. Picus ad l. post contract. ibid.* And all Lawyers are of opinion, that in neither of these cases, a delinquent may pay his former Creditors: And it is a received opinion amongst us, that all crimes which are capital do confiscate the commiters Moveables, though there be no Act appointing that confiscation, as a part of the punishment, because Moveables, *sequuntur personam.* And thus in the case of *Waugh* in *Selkirk*; The Lords found his Moveables to fall under Escheet for theft, though there be no express Statute confiscating the Moveables for theft But though this be followed in some particular Nations, as *France Ultrad. Concil.* 17. yet *Clarus* tels us, in *Quest.* 78. that *de consuetudine totus mundus servat*

quod

quod bona mobilia non confiscantur nisi ex dispositione statuti, vel consuetudinis, excepto crimine Heresis, & lese Majestatis. And particularly in theft, *Bossius* is clear, that the Moveables are not Escheet *nisi vigore statuti.* And why with us should it be declared by some Acts, that the committers life or goods shall be in the Kings will, and in others, that the committers Moveables shall be Escheet to the King, if this hold in all cases? 6. Where the committer is declared punishable by confiscation of his goods, and his goods are confiscated *ipso jure*, there even after the committing of the crime some think, that the committer can dispon no part of his Moveables, even before denounciation or citation. That being the effect of confiscation *ipso jure*, as is clear by the above cited Doctors. And it would appear, that confiscation *ipso jure*, must import somewhat more then the confiscation that results only consequentially from the nature of the deed it self. For else why needed the Law expres this; and if the Law has confiscated them at the time when the crime was committed, it would appear that the

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dominium is thereby transferred to the Fisk, and that consequently the committer is devested of them: *nam duo non possunt esse domini in solidum.* And if the committer be thereby devested of the property, he cannot dispon, for none can dispon but he who is proprietor. And yet even in that case the person injured, should have still action for his dammage, and interest, for he is mor prejudged by the crime, then the Fisk, and consequently it is not just that he should be excluded by the Fisk, since the Fisk has only interest by him, and by the wrong which he has suffered. But I refer the reader to *Peregrinus de jure fisci*, who has treated this question most lernedly.

5. This action is not only competent to the Creditor himself, but to the Creditors Heir, for *heres & defunctus sunt in jure una & eadem persona*, and not only is it competent to the Creditors Heir, but in many cases, it is competent to his singular successor, to whom either the right is asigned, or who becomes singular Successor, *ratione rei*, as Donators to Escheets, and forefaulters *&c.* as was found, *March* 1636. 6. The Defuncts Cre-

Creditors are allowed to reduce Alienations made to the prejudice of appearand Heirs, upon death-bed, when these Heirs were their Debitors, for though this priviledge seems only introduced in favours of appearand Heirs, yet their Creditors may comprise from them *omne jus quod in iis est*, and so reduce, as having comprised, as was found at the instance of *Balmerinochs* Creditors *contra* the Lady *Coupar*, and the *4th. January, 1672. Roxburgh contra Beatty.* And in this case it was found that even Creditors might pursue Declaratours and Reductions, upon this Act, though they had not yet Appris'd, albeit it was then alledged, that none has interest by our Law to pursue Reduction of a real right, except such as have a real right standing in their Person to the Lands, whereof they crave the right to be reduced. It is in some cases, not only competent to such as were *Creditores* before the alienation quarrelled was made, but even to such as were *Creditores futuri*, and became Creditors only after the alienation quarrelled was made. And the Civilians

mention

mention two caſes wherein this action is competent even to ſuch as were not Creditors the time of the Diſpoſition quarrelled: The firſt is, if the Diſponer deſigned to borrow money before he made the fraudulent alienation, and did borrow the money upon deſign to break with it, for there though the Reducer was not a true Creditor, the time of the alienation, yet the fraudulent inclination reſpecting expreſly this Creditor, or the borrowing of the money; made the diſpoſition revocable and reduceable. *Faſon ad jnſt. hoc tit. num. 6.* but here the deſign muſt be expreſly proven, or at leaſt muſt be neceſſarily infer'd from convincing circumſtances, and preſumptions. The ſecond caſe mentioned by them, is, if the Creditor did lend the money for paying prior Creditors; In which caſe, as they might have reduced the deed done in their prejudice, ſo may the poſterior Creditors, ſince they come in place of the Creditors whom they payed; *& ſurrogatum ſapit naturam ſurrogati.* But this laſt caſe does not (for ought I remember) take place in our Law, and ſeems not at all

all suitable to the Annalogy of our Law in other cases; for else he who had lent money to pay sums due upon an Inhibition, would have right to the Inhibition, or he who lent money to pay off Compryſings, or Areſtments, without being expreſly aſſigned to either. And therefore I conceive, that either the Creditor who payes the Creditors who were prior to the alienation, takes aſſignations to theſe prior debts which theſe pays, and then they may reduce deeds done to the prejudice of that firſt debt, or else he pays only the money to the Debitor, and the Debitor pays the prior Creditors, which is the caſe meaned by the Doctors here, and in this caſe I conceive, the Creditor who ſo pays, would not have the priviledge, aud that becauſe the debt which only had the priviledge is extinguiſht, *& non entis nullæ ſunt qualitates*, nor can the *maxime ſurrogatum ſapit naturam ſurrogati*, take place here, ſeing that the debt in whoſe place it is ſurrogat, became extinct before the ſurrogation: and none of the parties could deſign to tranſmit this priviledge, elſe the payer had taken

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Assignation; nor can he complain since *sibi imputet*, who did not that which he might have done for securing himself. As to the first of these cases, there was a famous decision extending thir Reductions even to posterior Creditors, 2. *July*, 1673. at the instance of *Street*, and *Jackson*, English-men, against *James Mason*. The case whereof was this, *James Mason* having dispon'd his Lands to *James Mason* his son, the said *Street*, and *Jackson* raised a Reduction of the sons right, as granted in prejudice of them, who were lawfull Creditors to him, by vertue of a Trade and correspondence which was begun long before the alienation; though the Bands wherein he became Debitor to them were of a date posterior to the alienation. To which it was answered, that the ground of the debt, being a bond, and the Bond being posteriour to the alienation, they were not Creditors the time of the alienation; and consequently the alienation was not reduceable upon this Act of Parliament 1621. To which it was replied, that this pursuit was not founded upon this Act 1621. only but upon

upon the ſure principles of the common Law, according to which the Lords uſeed to decide before this Statute was made, and according to which, they are warranted to proceed by this Statute in caſes that are new. Though the Debt was not conſtitute till after the Inſeſtment was granted, yet the purſuers having long before that time entred in a Trade with *Maſon*, they did *bona fide* continue that Trade without any interruption, and under the collour of that Trade he had moſt fraudently bought with their moneys this Land, and did moſt fraudulently convey the ſame to his Son to their prejudice: which did clearly inferr a deſigned fraud in the Father, and tended inevitably to ruine all Trade and Commerce which might be very eaſily diſappointed by ſuch fraudulent conveyances as this. Upon which debate the Lords ordained *James Maſon*, the Fathers count-books to be produced, that it might appear in what condition he was at the time when he made that Diſpoſition to his Son; And whether the ſame was granted upon deſigne to fruſtrate his Creditors, or not, likeas they allow'd witneſſes to be ad-

adduced for either party, for clearing the Lords how far the Trade was continued betwixt the Father and thir purſuers, before, and after the Sons right; After making of which report, the cauſe being again called, it was urged for the purſuer, that by the report it was clear, that there was a former Trade, and correſpondence betwixt them, prior to the Sons Infeftment, dureing all which time he oftimes ſold cheaper then he bought; and that when he went to take the Infeftment for his Son, he diſguiſed himſelf, and rode from, and to the Land, in a by-way, and cauſed ſo mark the Seaſing in the Minut-book, that no man could know but that the Seaſing was taken for the Father, and after the Seaſing was taken, the Father ſtill remained in actual poſſeſſion. From all which it was argued, 1. That *Maſon* elder having entered into a publick and unterrupted Trade, and correſpondence with the purſuers, the ſaid Trade is to be conſidered with reſpect to its firſt beginning, and the Bonds, though poſteriour to the Infeſtment, yet are to be drawn back *ad ſuam cauſam*, viz. the Trade and Com-

 mercc

merce from which they did result. 2. It was clear from the nature of Commerce in general, and from this report in particular, that former payments were still made the foundation of new credite: And if the making of such Rights during the dependance of such a continued Trade were allowed in favours of Children; no Merchand would give trust, or if they gave, they might be ruined by it, both which would be equally destructive to Trade. 3. If we consider the Analogy of our Law, we will find, that the Lords have still considered a continued, and uninterrupted Trade as very priviledged in many cases; And therefore though other compts prescrive in three years, yet that Statute uses not to be extended to a continued Trade, and correspondance, and so far have *privilegia mercatorum, & commercii*, been allowed in our Law, that Bills of Exchange are allowed, though wanting the ordinary, and Statutary solemnities of witnesses and warrands; for payment of Bills of Exchange are sustained without the solemnity of intimation, against posterior Assignayes, and Ar-

Arrefters: and Annualrent is ſuſtained betwixt Merchants, *ſine pacto, vel lege*, and a Bill ſubſcribed only by a mark, without either the ſubſcryvers intire name, or the initial letters of it, was ſuſtained, it being proven that the drawer of the Bill was in uſe ſo to ſubſcribe. 4. By the common Law, *Actio Pauliana* was extended even to poſterior Creditors, where *animus fraudandi*, prior to the alienation did appear, either by writ or preſumptions, which are enumerate by *Faſon*, *ad inſt. hic* and are very far ſhort of the preſumptions formerly condeſcended on: and if the common Law, and natural reaſon allowed this remedy in the caſe of debts abſolutely poſterior; how much more ought it to be allowed in this caſe, where the debt, which is the ground of this purſuit, depended on a prior cauſe, and was the reſult and product of a correſpondence entered into, before granting of the Sons Infeftment. 5. The Father had no Eſtate before this correſpondance, and having drawn fraudently into his hands the perſuers goods, about the ſame time that he bought the Land, Law and Reaſon preſumes that

the price of their goods, did pay the price of thir Lands: And that therefore this Land ought to be affected and burdened with their debts. To which it was duplyed, 1. That though the common Law did allow *Actio Pauliana* to posterior Creditors, yet that was only in the case where the receivers of such Rights were *participes fraudis* which cannot be alledged here, since the Son was minor *nec doli capax*, and that especially being introduced *in odium* of the colluſion, it cannot be extended to cases, where no colluſion can be alledged upon the receivers part. 2. Commerce and Trade is founded upon personal truſt, and Merchants follow the faith of those with whom they trade, without ever considering what real estate they have; so that thir pursuers cannot be said to have been cheated in their expectation, since they cannot be said to have furniſhed their goods, in contemplation of the real Estate now controverted. 3. Either thir pursuers did search the Regiſters, or not; if they did not, *sibi imputent*, *qui sibi non vigilarunt*; and if they did, they would have found that the Son was Infeft, his Infeſt

feſtment being Regiſtrate, and though the Minut-book did not ſpecifie, whether the Seaſing was granted to *Maſon* elder, or younger, yet they ought to have ſearched the Minut-book it ſelf, whereof this is appointed to be but an Index, and the Son not having been *particeps fraudis*, could not have been prejudged by any cheat or contrivance of his Father: for the *jus queſitum* to him by the Infeftment, *ſine facto ſuo ab eo auferri nequit.* 4. The purſuers did iunovat their accompts by taking Bond for the product, and *Maſon* had a diſcharge of all former accompts, and trade: ſo that at the time of the Diſpoſition, he was not their Debitor upon the accompt of any prior Trade; and the purſuers were no more to be conſidered as Merchants, but as common Creditors: And it were a very dangerous conſequence, to make debts that are innovated, retain all the priviledges that they had *ante jnnovationem & pernovationem prior obligatio perimitur. l. 1. ff. de Novationibus.* 5. It can be made appear, that *Maſon* had other Trade, which would have furniſhed him the price of the Land, and that he was loſer by the purſu-

ers Trade. To which it was replyed, that the common Law did only consider *participes fraudis*, in order to another effect, *viz.* if the Alienation was *ex causa onerosa*, then the Alienation could not have been reduced; unless the receiver had been *particeps fraudis*; but where it is *ex causa mere lucrativa*, as in this case *fraus in eventu* was sufficient. And even here the Disposition being made by the Father to his own Son who was *in familia*, the Son, was in as ill condition, as if he had been *particeps fraudis*: nor could he plead the same benefite as a stranger, contracting *bona fide*. Upon which debate, the Lords did reduce the Disposition, as being made to the Son, by the Father, who was a Merchant, during his publick Trade and correspondance. Which Disposition could have no other rational designe, but to cheat Creditors, the Father not having so much as reserved himself a liferent, or power to redeem. But since the Lords declared that this decision proceeded upon all these grounds joyntly, it can hardly be extended to other cases. And I find that this publick interest, and advantage

of

of Trade and Commerce, has been sustained to reduce deeds done to the prejudice thereof: but yet not upon this Act, and Statute, but upon the general ground of fraud, infer'd by most pregnant qualifications, as is clear by the decision betwixt *Pot* and *Pollock*. 12. *Feb.* 1669. The case whereof was this, *John Pollock* being Creditor to his Wife of a second marriage, for her life-rent provision, and to others to whom he owed money, they appriſed his Estate, and assigned their rights to *Pot*, who thereupon intents Reduction of a Band granted by the defunct to *James Pollock*, his Son of the first marriage, for 5000. merks. The reasons of Reduction were, first, that this Band was granted by a Father to his own Son, without an onerous cause. To which it was answered, that they not being Creditors when this Band was granted, this Act of Parliament allowed them no Reduction of it, for this Act is only conceived in favours of prior Creditors, and since his Father might have gifted away his Estate to a stranger, and even that gift could not be quarreled by posterior Cre-

Creditors, becauſe they had not then intereſt, and ſo their intereſt could not be ſaid to be prejudged, there was no ſpeciality as to him, why he might not be capable of the ſame donation; And whereas it was alledged, that this would ruine Commerce, becauſe a Father might grant ſuch a right, and thereafter keep it latent, and cheat his Creditors with whom he Traded, who could not know the condition of the Defunct. To this it was anſwered, that the Act 1621. introduced no ſuch ſpeciality in favours of Trade, but upon the contrair, ſuch Diſpoſitions, when made by Merchants, were leſſe preſumeable to be done in defraud of Creditors, then when made by ſuch as had no Trade, nor Commerce, becauſe Traders might grant Bands to their Children, in expectation of what they might gain, and when they fell thereafter *inſolvendo*, that might be imputed to their loſſe by Sea, or Trade, and not to the donation in favours of children. Upon which debate, the Lords repelled the reaſon founded upon the Act 1621. The 2. reaſon was, that this

Band

Band was reduceable *ex capite doli*, as granted by colluſion betwixt Father, and Son, in *necem Creditorum*, and to defraud their juſt intereſt: which *dole*, and fraud, was inter'd from theſe circumſtances, 1. That the Son being *forisfamiliat*, and provided, it could not be granted for any onerus cauſe. 2. The Band was kept latent till the Father died. 3. It did bear no annualrent, and the term of payment was delayed till after the Fathers death. 4. Their debts were all contracted immediatly after the granting of this Band; ſo that it appeared clearly, that he had deſigned to exhauſt his Eſtate by this Band in favours of his Son, and then to contract debt freely, and to apply their money to the payment of this Band. Upon which qualifications of fraud, the Lords reduced the Band. The third reaſon was, that this Band granted by a Father to a Son, was but a *legittim* or *portion natural*, in the conſtruction of Law, and therefore was revockable by the Father, and conſequently by his Creditors; and *legittims* did only affect the the Defuncts free Gear; which reaſon was

alſo

also justly repelled, for this being a Band granted to a son, who was *forisfamiliat*, and being delivered to himself, was found not to be of the nature of a *Legittim*. First, because it did not bear to be in satisfaction of his *portion natural*. And secondly, because it was an ordinary Band, and delivered in the ordinary way.

There was another case decided *4th Decemb.* 1673, Wherein the Lords reduced a Disposition granted by *Reid* of *Daldilling* to his Son, even at the instance of posterior Creditors, in respect that the Right was base, and that the Father continued still in possession, and acted still as absolute Fiar, and that the Registers of that Shire were carried out of the countrey, so that they neither could, nor were obliedged to know the Sons Infestment. And that, albeit it was alledged for the Son, that as fraud never ought to be presumed, so there is no ground for presuming it here, since this infestment ought to be imputed to another cause, then a design to defraud Creditors, *viz.* to a prior Contract of Marriage, wherein his Father

Father having gotten a great portion with his Mother, was thereafter obliedged to Infeft him in his Lands, and this being the ordinary way taken to ſecure ancient Families againſt prodigal Sons: And it being the ordinary remedy taken by provident men, when they give great portions with their Daughters, It were very dangerous to reduce ſuch Diſpoſitions at the inſtance of poſterior Creditors, in whoſe favours nothing was provided, by the Act of Parliament, and the Sons Infeſtment being regiſtrat, did likewiſe take off all preſumption of fraud. And though the Regiſters were taken away, that could not prejudge the Defender, or be a ground of Reduction here, no more, then it could defend him againſt a Reduction *ex capite inhibitionis*, or *interdictionis*, for the uſer doing *omne quod in ſe eſt*, and following the faith of publick Regiſters, cannot be prejudged by an accident, to which he had no acceſſion. And there was as good reaſon for reducing interdictions at the inſtance of poſterior Creditors, as for reducing ſuch baſe Infeſtments: the not allowing of which would ſtill force

Sons

Sons thereafter to be at the great expence and trouble of publick Infeftments, and even theſe publick Infeftments, were lyable to the ſame reaſon of Reduction, ſince lawful Creditors were in both caſes prejudged; and a Son preferred to them. And though equity ſhould be conſidered, where there is no Law; yet where there is an expreſſe ſtatute, in which many caſes are conſidered, *caſus omiſsus, habetur pro omiſſo.* It was here obſerveable, that the Contract of Marriage did not bind the Father to Infeft the Son in theſe Lands, but that hereby the Eſtate was only provided to the Heirs of Marriage, ſo that the Son behoved to have been ſerved Heir, and ſo would have been lyable to the Fathers debt, if this new Infeftment which was here quarrelled, had not interveened.

Not only deeds done to the prejudice of prior Creditors are reduceable, but even deeds done *doloſe* to the prejudice of ſuch as became Creditors, at the ſame time with the deed done, are reduceable. As for inſtance, one brother grants a Band to another, upon deſigne to let the friends

of

of her whom he is ſuiting in Marriage, ſee that he has an Eſtate, and immediately after the Contract, or about that ſame time, grants a Diſcharge to his brother, having engaged the womans friends to give him a gerat Tocher in contemplation of that fallacious Band: this Diſcharge is reduceable, as given fraudulently to the prejudice of the woman who gave the Tocher. And who is Creditrix by that Contract, without reſpect to priority or poſteriority of the debt. As was found in the caſe *Henderſon* againſt *Henderſon*; and *Donald Foller* being provided by his Father, in his Contract of Marriage; to the Conjunctfee with his Wife, of a Tenement of Land, the Fee whereof was provided to the children of the Marriage, and the Father having fraudulently taken a tack from the Son at the ſame time; the Lords reduced the ſaid tack, as done in defraud of the ſaid Contract, *& contra fidem tabularum nuptialium.* And if this had been otherwiſe decided, all poor women might eaſily be cheated, and Contracts of Marriage, which are the obligations moſt priviledged by Law, would become

become ineffectual and might easily be evacuated: And so favourable are such obligations in Contracts of Marriage, that *Glencorsse* having provided his Sons by several Bands of Provision, and having thereafter dispon'd his Estate to his Son in his Contract of Marriage, the Son having got a good Tocher in contemplation of this Estate; the Lords did find, that the Sons Fee could not be reduceable by, nor affected with those Provisions, since they were but latent Rights, which neither the Son, nor they who contracted with him were obliged to know.

The presumptions from which Lawyers conclude a designe of cheating future Creditors, are those. 1. If the Debitor dispone all his Estate, *assignatio omnium bonorum*, especially if he reserve not his own Liferent, as in *Masons* case, for it is presumed, that no man would denude himself of all means of subsistance without some malicious designe, and if the Disposition be made without an onerous cause, *l. omnes §. Lucius ff. de his quæ in fraud:* or for a lesse price, then the thing dispon'd was truly worth, *Strach. tract. de decoct. part. 3. num.*

num. 2. but since *licet contrahentibus in emptione vel venditione seinvicem decipere.* It seems that this extention should not hold, except where the thing dispon'd is much under-rated. 2. If the Disponer be Bankrupt, or a Cheat. or *deplorata vitæ. Strach. num.* 23. 3. If he borrowed immediately after the Disposition. 4. If he borrowed secretly, and desired to conceal his condition, as in *Masons* case. And 14. *Decem.* 1671. *Duff* contra *Culloddin* this qualification of fraud, was sustained to reduce an Assignation made by one brother to another, *viz.* That the resigner desired the Resignation should be kept secret, and thereafter suffered his brother to continue in possession. 5 If he borrowed summs far above his fortune: and upon this last presumption, a Merchant in *Paris* was executed, having borrowed vast summs, with which he broke next morning after they were borrowed.

To any conjunct or confident Person.

THe reason why the Act suspects such, and is more unfavourable in the case of Dispositions, and Rights made to conjunct or confident persons; is, because these have easier occasions of making, and are more pron to make such Rights then any else. For what strangers would cheat Creditors for one another; and though a Debitor will be desirous to prefer his Creditors to Strangers; yet he will be ready to prefer his Friends to his Creditors. Which reason seems to be insinuate by that excellent Law, *l.* 27. *C. de donat. Data jam pridem lege constituimus, ut donationes interveniente actorum testificatione conficiantur, quod vel maxime inter necessarias, conjunctasq; personas convenit custodiri. Si quidem clandestinis ac domesticis fraudibus, facile quidvis pro negotii opportunitate confingi potest, vel id quod vere gestum est aboleri.* And the

the Doctors have received as a brocard, that *conjunctus presumitur scire facta conjuncti*, *l. octavi: ff. unde cognati*: and therefore *presumitur alienatio in fraudem facta, quando facta est donatio omnium bonorum vel conjunctæ personæ*, Bart. *ad l. post contractum*, *h. t. num.* 30. Our Law has not fully determined who are repute conjunct persons, since this opens a door to arbitraryness in Judges, it had been fit the Law had obviated by a special definition, *quo ad* this Poynt the power of Judges, as well as the fraudulent conveyances of Creditors. But certainly Father and Son, and all degrees ascendant and descendant, are repute conjunct. And because these are the most near relations, therefore Dispositions made to them, are not only reduceable by this Statute; but such Dispositions, when made to such as might have been Heirs, make the receiver succeſſor *titulo lucrativo post contractum debitum*. Which passive title was not extended against a Brother, though the Disponer was so old that he could not expect Succession whereby his Brother might be excluded, nor was the presumtion of fraud

ſo ſtrong amongſt collaterals, as to infer ſo odious a paſſive Title, but reſerved Action upon this Act, 1621. in ſo far as the cauſe was not onerous, 7. *Decemb.* 1672. *Spencer-field contra Kilbrakmont.* 2. Brother and Brother are repute conjunct Perſons. But whither this ſhould be extended to the ſame degrees in *affinity*, as in *conſanguinity*, has often been contraverted; and it is certain, that in other Statutes, *non idem eſt jus affinitatis, ac conſanguinitatis*; And thus the Statute forbidding Father, Son, or Brother, to judge in Actions of their *correlati*, is not extended ſo as to prohibite Fathers, Brothers, or Sons in Law, to judge in ſuch caſes; as was found in *Mores* caſe againſt *Gruibbit*. But yet a Siſter in Law was found to be a conjunct perſon, 5. *July* 1673. *Hoom* contra *Smith*. And a Brother in Law was repute a conjunct Perſon in the Reduction againſt *Major Biggar*, at *Waughaps* inſtance. And *Sneidivin hoc tit, pag.* 1209. tells us, that *inter affines & conjunctas perſonas fraudes preſumuntur*. And ſince men will do as much for their Allies, as for their blood Friends, eſpecially for Siſters,

or

or Brothers in Law; and that the Law upon that ſame reaſon repells them from being witneſſes. It ſeems moſt reaſonable that they ſhould be repute conjunct Perſons. And it is not imaginable why the Law, which is jealous that an allye or *affinis* may perjure themſelves for another, ſhould not be much rather unwilling to aſſiſt them in ſuch conveyances as thir, to the prejudice of their Creditors, where the cheat is eaſier, and leſs dangerous.

But whether a Baſtard be ſuch a conjunct Perſon, as that a Diſpoſition made to him by his Father is Reduceable; may be doubted: for upon the one part, a Baſtard *patrem demonſtrare nequit*, and he who is of no blood, cannot be conjunct upon the account of Blood: And yet upon the other part, a Baſtard is known to have much natural affection, and ſo may be preſumed a perſon willing to conveigh ſuch frauds: and upon this accompt, the Law rejects him from being witneſs in favours of his natural Father, *Marſil. ſingul.* 273. And a Baſtard with us is only received *cum nota*. And the

Law hath allowed him action againſt his Father for aliment. And though the Law will allow him no advantage by his birth; yet it ſhould not capacitate him to cheat others: and I think this diſtinction more reaſonable then to ſay with *Paleot*: that Baſtards are not conjunct upon the Father ſide, but on the Mother ſide. *cap.* 60. *de nothis*, or to ſay with *Alex. conſil.* 60. that theſe are to be accounted conjunct, in ſo far as concerns marriage only, ſo that a Baſtard Brother cannot marry his Baſtard Siſter; for certainly, though theſe be not conjunct in ſtrict Law, *ſunt conjunctis ſimiles felin. ad cap. per tuas de probat.*

Who is underſtood to be a confident, ſeems more difficult, and it would ſeem that an ordinary Factor, or a domeſtick Servant muſt be ſaid to be confident Perſons, and an ordinary Agent was found to be ſuch a confident Perſon, 26. *June* 1672. *Moubra* againſt *Spence*, and *Immola ad h. t. leg. poſt contractum* affirms that *Amicus*, *magna amicitia conjunctus*, is lyable to this preſumption, and the Law judges ſtill of him as of *conjunctus ſanguine*,

and

and friendſhip is ottimes warmer then blood.

Diſpoſitions likewiſe *omnium bonorum*, are reduceable, though not made to confident Perſons, but to a meer ſtranger: except the Diſpoſition be made for an onerous cauſe, for the Law preſumes as I obſerved formerly, that it is made to prejudge Creditors; and it were unreaſonable that a meer gift ſhould be preferred to poor Creditors, this was found the 18. *November* 1669. *Henderſon contra Henderſon.* Albeit it was there alleged, that this Act declares ſuch deeds only reduceable, as are made in favours of conjunct or confident Perſons, for though this Statute make that a preſumption of fraud, yet it excludes not other preſumptions, ſuch as were in this caſe, *viz.* that it was *aſſignatio omnium bonorum*, and that it bears to be granted for a cauſe falſly narrated, *viz.* for the ſumm of two thouſand merks, due by *Howat* the common Debitor to *Anderſon*, whereas it was offered to be proven by Diſcharges under *Howats* own hand, that the far

greateſt part of this ſum was payed before the Diſpoſition.

Since this clauſe of the Statute annuls deeds only done to the prejudice of confident or conjunct perſons, it would ſeem, that ſuch Rights when made to others who are not conjunct, nor confident, are not reduceable. And yet *de praxi*, all Rights made to any perſons whatſoever, without an onerous or neceſſary cauſe, are reduceable by this Statute, and our Law conſiders the difference betwixt conjunct, or confident perſons, and others; only in reference to the way of Probation, ſo that theſe muſt prove an onerous cauſe whereas others need not; this ſhews how miſterioufly our Statutes are conceived.

With-

Without true just and necessary causes, &c.

Titulus onerosus, is when any thing is dispon'd with the burden of doing or paying somewhat, *titulus lucrativus*, is when the deed is meerly *gratuitus*, and proceeds from meer favour,

The Civil Law observed two Rules, in the difference betwixt an onerous, and lucrative cause, *quoad* this Action. The first was, that this Action was competent, even against these who had received such Rights for onerous causes, when both the giver and receiver were guilty of fraud, if they were partakers of the fraud, *l. ait. prætor ff. h. t.* And in that case the thing alienated was recalled without restoring the price. The second Rule was, that he who had received such a Right, *ex causa lucrativa*, was lyable to restore, though he was not accessory to the fraudulent conveyance. *nec particeps l. quod autem §. ij. ff. eod.*

Our

Our Law likewiſe conſiders two caſes, one is, if the Creditor had done no diligence; and then Rights made to their prejudice are only reduceable, if they be made to confident perſons without an onerous cauſe: The other if the Reducer has as a Creditor done diligence, and then the Rights done to his prejudice are reduceable, whether they be made *ex titulo oneroſo*, or *lucrativo*. For by the laſt part of the Act, it is declared that the Debitor cannot prefer one Creditor to another, to the prejudice of any ſuch diligences.

How far children are Creditors to their Father, and may upon this Statute reduce deeds done by their Father in favours of other children after their Proviſions, may be dubious in many caſes, of which I ſhall only name a very few. The firſt is, a Father by his Contract of Marriage with the firſt Wife, provides the children of the firſt Marriage to ten thouſand Pounds, and by the Contract with a ſecond Wife, provides them to twenty thouſand Merks, and by a Contract with a third Wife provides the children of that Marriage to ten

thou-

thousand Merks. The question rises, whether the children of the first Marriage can reduce the Contract of the second Marriage, *quoad* the Provisions therein made as made in prejudice of them who became lawful Credtors by the first Contract; or if the children of the second Marriage, may not do the same to the children of the third Marriage: and I conceive that if the Provisions be made to the Heirs of the Marriage, and if they enter Heirs, they cannot reduce, because *tenentur prestare*. But if the Contract bear children of the Marriage, some think that they may assigne their Portions, and the assignay may reduce these Provisions made in the second Marriage. And just so the children of the second Marriage, may reduce the Provisions made to the children of the third Marriage: But I think, that either the children of the first Marriage are Infeft, and then certainly, the Father cannot prejudge them by posterior personal Provisions, or else where neither are Infeft, I conceive, that if there be an onerous cause, such as a Tocher payed by the Contracts of the second, or third

Mar-

Marriages, and then also the Contracts cannot be reduced upon this Statute: For these Contracts are not made to defraud Creditors, since they are made for an onerous cause. Yea though there be no Tocher, yet even the Marriage is an onerous cause; for who would marry if there were no Provision, and the designe here, was not to prejudge true Creditors.

The other case is, a man in his first Contract provides his Land, and ten thousand Merks to the Heir of the first Marriage, and in the Contract with his second Wife, he provides the children of that Marriage, to the conquest that shall be made during that Marriage. The question is, whether the Son of the first Marriage will be Creditor to the Father for ten thousand Merks, even though he be served Heir to his Father: For though here it seems, that *confusione tollitur obligatio*, the son of the first Marriage being both Debitor and Creditor. Yet conquest is still understood to be, *illud quod super est deducto aere alieno*: and therefore the children of the second Marriage, can

 have

have no Right but with the burden of these ten thousand Merks. And in the case of *Scot of Bavile* contra *Binning*. The Lords found that the Heir might reduce the Provisions made to the Wife, and Bairns, of the second Marriage, in so far as concerned, the ten thousand Merks provided to the Heir of the first Marriage: but this may be doubted; for first it may be alledged that there was no debt, since the Pursuer was the Debitor himself. But secondly if the money with which the Land was bought, was conquest also in the second Wifes time, it seems against Law and Reason, that this should not be called conquest *quoad* an Heir of another Marriage, *cui nihil deest*, though if the money had been conquest in the first Marriage, it might be more properly called *Æs alienum*.

A third case is this, a Father obliedged himself in his Contract of Marriage, with his first Wife, to provide the Bairns of the Marriage, to eight thousand Pounds: but before his death he provides one of the three Bairns to the whole eighth. The The question propon'd was, whether the other

other two Daughters might raiſe a Reduction of the Diſpoſition made to their ſiſter upon this Act, and for theſe ſiſters it might be urged, that the brother became Debitor to them *prorata*, even as if he had granted Band to ſix men for a ſumme, each of them would had Right to a proportional part of it; at leaſt, that each Child became Creditor to him, and ſo ſomething was due to each of them. And conſequently he defrauded them by his diſponing all to to any one: but for the other ſiſter, to whom the Diſpoſition was made, it might be alledged, that the Father was Debitor only to the Bairns of that Marriage, *tanquam ſtirpi*, and ſo he ſatisfied his obligation by diſponing his Lands worth that ſumm to any one of them, but was not Debitor to them in *capita*. 2. The deſigne of the parties Contracters, in ſuch caſes, is only to ſecure the ſumm to the Iſſue of that Marriage, without conſideration of any diviſion; for this Proviſion is made to ſecure againſt Children of other Marriages, but not to ſecure one Child againſt another, and there may be

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some reason to be jealous of the Father in the one case, but not in the other. 3. This restriction were contrair to the Fathers *patria potestas*, and the Law is never jealous of the Fathers affection, but presumes that his division will be just, and what Judge should be juster to Children then a Father. 4. It were against the interest of the Commonwealth to restrain, or take away the Fathers power of Distribution in such cases, which is the great curb, that the Father has upon his Children, for making them good Children, or good Citizens, and were it not against reason, that if the two sisters had been very Vitious, and the third most Virtuous, that the Father should have been so bound up, that he could not gratifie the one, or that he behoved to provide the other with Money to serve their lusts. 5. It is ordinar to provide expressly, that the Money so provided to the Children should be divided as the Father pleased, and the Law uses to decide general cases according to what is ordinarily pactioned, presuming that to be the *tacit* will of the parties, which is ordinarily the

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expréss will of other parties. Likeas if it had been contraverted amongst the parties at the time when the Contract was to be subscribed, who should have had the Power of division? certainly, it had been allowed to the Father. To which last I incline, except it could be alledged that all were equally deserving, and that the Father, or Children preferr'd, had used indirect means in preferring one to the rest. For though there be no Testament *querela testamenti inofficiosi*-- with us, yet there may be some place perhaps, for the Judge to interpose in such cases. I find by the opinion of the Doctors, a Father Disponing to one Child a necessary Portion, is not said to defraud the rest of the Children, to whom he Disponed formerly, *nam hoc potius tribuendum pietati quam fraudi.* And it is clear, that for this reason, *Libertus in fraudem patroni, filie dotem constituere poterat l. 1. §. sed ff. si quid in fraud. patro*, but it is not so with us in all cases, as has been formerly observed.

It has been likewise debated, whether provisions by Parents to their Children, in

in their Contract of Marriage, be ſuch onerous cauſes as may defend the Children againſt Reductions upon this Act, at the inſtance of Creditors, who crave Diſpoſitions made to them in ſatisfaction of theſe obligations to be reduced. For upon the one part, it ſeems, that ſince they are Creditors who may purſue, and diſtreſs their Father, therefore their Father may diſpone his Eſtate, and this is both a neceſſar and a prior Debt, and ſo falls not under the Act; which declares only ſuch Rights reduceable, as are granted without true, juſt, and neceſſary cauſes. And Proviſions of Children by Contracts of Marriage are the ordinary allowable remedies granted to ſuch as paying Tochers with their Daughters, or providing their Sons, deſire to ſee their Grand Children thus ſecured. But upon the other hand, it ſeems very hard, that ſuch latent deeds as Contracts of Marriage, which Creditors cannot know, ſhould be ſuſtained as onerous Cauſes to ſeclude them; and that the Debitors own Children ſhould be preferred to Creditors. And as there can be no debate as to this point,

where

where the Provisions are made in favours of the Heirs of the Marriage, becauſe there the Heirs muſt repreſent the granter, and ſo cannot reduce his deed, ſo where the Proviſion is made to Bairns of the Marriage, yet Creditors were preferred to them in the caſe of *Bannerman* of Elſick *contra Hayſtoun*. But upon the 3. *July* 1673. in an Action, *Gordon* contra *Fraſer*: The Lords found, that a right to Moveables made by the Father to his Children, was reduceable at the inſtance of Poſterior Creditors; though it was made in ſatisfaction of the Mothers Contract of Marriage, except the Children would alledge that the Father was not Bankrupt, but had an ſufficient Eſtate to pay the purſuers; for they thought it much more reaſonable, that the Children ſhould looſe by their Father, then the Creditors.

It has been contraverted, whether a Right made by a Father to his Son in law for a Tocher, be reduceable by an anterior Creditor, and if this be allowed in all caſes, men may eaſily prefer their Children to their Creditors; and it would appear,

pear ; that at least the Right so made, should only be esteemed onerous *in quantum*, it extends to such a value, as may be a suitable Tocher ; for such a mans Daughter, or else it should be repute onerous, in so far as may answer to the Joyntur given by the Husband, or to the aliment that he is oblieged to bestow upon her *stante matrimonio*, though he be by Contract oblieged to no Joyntur ; nor hath any Joyntur to give her, *et ita dos, est titulus onerosus, ex parte mariti ; quia datur pro oneribus matrimonii, sustinendis l. pro. oneribus C. de jur. dot. sed ex parte uxoris dos, est titulus lucrativus. l. qui liberos ff. de ritu nuptiar. l. fin. C. de dotis* νυπερ θυγατερος μη ετι ελαβη δανειςων εδοκα προικα απαιτειται. *Basilic. l.* 25. S. 1. *hoc tit.* And upon the other hand, a Joyntur to the Wife is *titulus onerosus*, in swa far as it is suitable to the Husbands Estate, as was found *Novemb.* 1665. *contra Russel.* But if the Husband should Dispone all his opulent Estate to his Wife, as a Joyntur, I think it might be reduced to a third, at the instance of prior Creditors, both because a Tierce is the Provision, that the Law allows a Wife if there

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beno provision; and so is the legal *quota*. And because Rights made by a man upon Death-bed, to the prejudice of his Heir, is restricted to a Tierce; but if the Contract bear, the Land to be Disponed to the Son in Law for love and favour, that narative proves *titulum lucrativum*, though really no other Tocher was bestowed; and though a Joynter was given, as was found betwixt *Graham* and *Stewart*.

How far a Wife is Creditrix by her Contract of Marriage, and may reduce Posterior deeds as done in defraud of it, is debateable in many cases, as to Heretage; but these fall not properly under this Act, but under the Act 105. *Par.* 7. *Ja.* 5. And as to the Husbands Moveables, I shall only mention one case, *viz. Campbel contra Campbel, Decemb.* 1674. which was this; *Campbel* by his Contract of Marriage, provided his Wife to the half of the Moveables, that should pertain to him at his Death, and a little before his Death, he Disponed many of his Moveables to his Brother; whereupon the Relict raises a Reduction of that Disposition upon this Statute.

tute. To which reason of Reduction, it wa answered, that the reason was not relevant for the Relict was only Creditrix by this Contract, as to what Moveables should belong to the Husband at his Death, which was but κλιρονομια κατελπιν, *& spes succes-sionis*, but did not hinder the Brother to Dispon at any time, in his *liedge poustie*, upon any part of his Moveables. And as such Clauses providing a Wife to the third of the Moveables, were most ordinar, so if this were sustained, the Husband could not gift to his Brother, or Relations, any Horse, or any thing else. To which it was replyed, that if such Dispositions were sustained, the former, or the like Clauses would be Elusory, and might easily be Evacuated; for a Husband might Dispon a little before his Death all his Moveables: this was not decyded. But the Lords inclined only to sustain this Disposition, if made for some probable Cause: but if it had been made upon Death-bed, it was Reduceable, or if there had been great presumptions of fraud adduced to clear, that it was contrived as a meer cheat against the Relict. But were clear, that

if the Donation, was only of one particular thing made *in leidge pouſtie*, it could not be quarrelled upon this Act. It may be doubted, if when the onerous Cauſe expreſt, is not true, or if there be no onerous Cauſe, but that the Right granted, bear expreſly, to be for love and favour. If in either of theſe caſes, it be not lawful to the granter to aſtruct his Diſpoſition, when quarrelled upon this Statute, by offering to prove, true and real onerous Cauſes, prior to the Debts whereupon the Reduction is founded. And firſt, it is without all doubt, that if the Right bear no Cauſe, the uſer may condeſcend upon, and offer to prove the true and onerous Cauſe. 2. I find it decided, that where the writ did bear only love, and favour, though granted by a Man to his own Wife; ſhe was allowed to aſtruct it, by founding it upon her Contract of Marriage, and aſcribing it to make up the defects of the Lands, provided to her by her ſaid Contract. *January* 1669. La. *Brae*, contra *Chiſholm*. 3. Where the Diſpoſition did bear love and favour, and other onerous Cauſes: Either the receiver of the Diſpoſition

position was admitted to astruct the Disposition, by proving an onerous Cause adequat to the worth of the Land. In the case *Naper* contra *Ardmore*; which Decision may be debated, for why was love and favour insert, if the Cause was adequat, and this was a great presumption of the fraud, especially in a Disposition by the Father to the Son, for though, *utile per inutile non vitiatur*. And that this might have proceeded *ex stilo*, yet in suspect cases, where it is known that narratives are much considered, these Arguments are but weak.

4. Where the writ bears an onerous Cause, and that the Cause can only not be proven. Then it seems reasonable that the person to whom it was granted, may astruct his right, by offering to prove that there were othere summs justly resting to him. 5. If the Disposition bear an onerous Cause; but if it be proven expresly, that the Cause expreſt is not true, but is caluminously, and fictitiously expreſt: I would conclude, that the user should not be allowed to astruct another true Cause, and that in *odium falsi, & calumniæ*: even as if the date of an execution, or other dili-

gence, be found to be false; the user is not allowed to astruct the same, by condescending upon another true date, and abiding at it.

Without true and Competent.

THe Doctors also condescendes upon a third kind of Title, different from both a lucrative, and an onerous Title; and this they call a mixt Title, *titulum mixtum, l. apud Celsum §. authoris ff. de except doli. vid. Fason ad l. nemo potest ff. legat:* and an instance of this is given in an Alienation made in defraud of Creditors, for lesse then the true price. And even in this case, Reduction is competent for the Creditor, prejudged, in so far as the price received is below the true value; and thus, *l. 7. Basil. h. t.* εἰ πρὸς περιγραφὴν δανειστῶν μὴ ἐλάττονος πολισθῇ ἀγρὸς, ἀνατρεπτέον τὸ πραχθὲν ἂν μὴ ἀναδοθῇ ἡ τιμὴ, *si in fraudem Creditorum meorum, minore pretio fundum vendidero*

didero, revocatur quod gestum est, etiam non reddito pretio, but since, *licet contrahentibus in emptione & venditione se invicem decipere*, and that we see prices of Land very different, every man taking his advantage. It may seem strange, why the Law should prejudge so far the Buyer in this: and I conceive, that except the price be palpably made so low, upon design to cheat Creditors, (any of the Creditors having offered more) or that it is extraordinary low in it self; such prices cannot be challenged. As if a chalder of Victual, worth truly 3000. Merks, were sold for 2000. Merks: But yet I think not that it behoved to be *ultra dimidium*, below the just half; for then it might have been reduced by the Civil Law upon another head, and so this Action had been unnecessar.

Whether if any Debitor buy a hazard (*jactum retis*, as Lawyers call it) *v. g.* if he buy a womans Liferent at seven years purchase, and dispone his Land for the price: if he die the next year, may not I reduce that Disposition, as done to the prejudice of me a lawful Creditor; even

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as a Minor might reduce such a bargain, if made by his Tutors. To which I conceive it may be answered, that it cannot be quarrelled, if it was made in the ordinary way, and for the ordinary advantage, for which a man would have transacted it, if he had no Creditors, and if no design to defraud, can be shown: and here that maxime holds, *fraus & eventum, & consilium requirit*: nor are the Leidges put in *mala fide* to Contract with Debitors in such cases.

Without just.

IT is not sufficient, that the price or cause be onerous, but it must be just; that is to say, a price which the Law allowes; as for instance, if a man should loose a great summ at Game, and for payment of it, should dispone his Lands, that Disposition might be quarrelled as made without a just price, because the Law allowes not the payment of what is gained at Game, if it exceed 100. Pounds Scots.

And

And since the Law would not sustain Action for it, at the gainers instance against the Debitor who looſed it, much leſſe should it sustain a Diſpoſition for payment of it against the Creditors, and yet this may be said to be an onerous cause; for the looſer hazarded as much of his own, against what he gained, and so this Game was but the return of his Money: and like to *emptio jactus retis*. And though it may be alledged, that by the 13. Act, 23. Pa. *Fa.* 6. The superplus of what is gained at Game above 100. Pound, be ordained to be consigned for the poor of the Parish. And so the Diſpoſition made for payment of it, must accreſſe to them; and is still an onerous and neceſſar debt, *quoad* the looſer, and consequently is not reduceable at the instance of his Creditors; yet I conceive that such a Diſpoſition would be reduceable at their instance, as not made for a just cause, since it is made for a cause, upon which the Law would not allow Action. And the Civilians number, what is gained at Game, amongſt lucrative causes, *Bald. ad l. i. C. ſi quid in fraud Patron.* And generally what is acquired unlawfully, is by them said to

be

be acquired, *titulo lucrativo*, *Faſon hic num.* 8. and thus Diſpoſitions granted *ob turpem cauſam*, *&c.* may be ſaid to be reduceable alſo upon this Statute, as granted without an juſt and onerous cauſe: according to them; as it is granted without a juſt cauſe, to ſpeak in the termes of this Act. And I think, we ſpeak more properly then the Civilians here, for what is gained at Game, rather wants a juſt cauſe, then an onerous cauſe.

And neceſſary cauſes.

DIſpoſitions made to conjunct or confident perſons may be quarrelled, though they be made for an juſt and onerous cauſe; if they be not made for an neceſſar cauſe. For it may be fraudulent, and be deſigned to prejudice Creditors, except the cauſe be neceſſary, though it be onerous. As for inſtance, if a conjunct, or confident perſon; knowing that his Debitor intends to fruſtrat his Creditors, and to go out of the Countrey,

and

and yet presuming that a Right granted for an onerous cause cannot be quarrelled, should so far comply with his fraudulent design, as to buy Land from him, and to pay him the price upon that design, such a transaction may appear to be fraudulent, and lyable to be questioned upon this Act; and these words of it, without true just and necessary causes.

To have been from the beginning; and to be in all time coming, null, and of none availe, force, strength, or effect; by way of action, exception, or or reply, without any further Declarator.

BY this Paragraph of the Statute, the nullity arising from this Statute, is reduceable by way of exception, as well as action, *ope exceptionis*, as our Pra-

Practick terms it: and this was introduced in favours of the Pursuer, who is leised by the fraud, whose advantage it is to have his interest sustained to him any way, and so to have his diligence thus shortned.

For the clearer understanding of these words, we must consider, that by the common Law, nullities are either such as are received *ipso jure*, or *ope exceptionis*. That is said to be null, *ipso jure*, where the thing is declared null by any expresse Law, as this is by this Statute, *quod contra legem fit, pro infecto habetur, & ipso jure nullum est. l. non dubium C. de legib*: that was *nullum ope exceptionis*, which was not receiveable, except the nullity had been proponed, by him to whom it was competent. But in our Law *nullum ipso jure, & nullum ope exceptionis*, are the same, *& termini convertibiles*: and with us the opposition is betwixt *nullum ope exceptionis, & actionis*; the reason of which difference proceeds from the favour designed by the Law, *quoad* the form of procedure. For if any thing be null by way of exception, it is received summarly against the pur-

purſuite, without raiſing an Action of Reduction, or Declarator: but what is only null by way of Action, needs Proceſs of Reduction, or Declarator. By the common Law, either a Penalty was not adjected to the prohibitory Law, but the thing was ſimpliciter prohibited, and theſe things were *ipſo jure null.* But if the Law proceeded further, and adjected a Penalty; then either the Penalty was adjected to the annulling of the deed: and then the deed whereby the Law was contraveened, and the Penalty, was both due, or elſe the deed was declared null, but ſo that it was ſome way allowed to ſubſiſt, but a remedy was appointed, and then it was not null *ipſo jure*, but was reduceable by the way appointed; according to the principles of the common Law, this nullity was receiveable *ipſo jure*, for quod *contra legem fit, id ipſo jure nullum eſt.* But ſo it is that this alienation in defraud of Credirors, was declared null by the Law, and by this Statute being declared null, that nullity ſhould be receivable *ope exceptionis*, and yet by our practice the nullity ariſing from this Act, is oft-times received only by

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way of Reduction, whereby the Lords have receded from the expresse words of the Law; and the only reason I can give for for it, is, that the Author or Disponer must be called to maintain his Right; which could not be if the nullity were receiveable *ope exceptionis*: and if the Disponer were called, he might eleid the the pursuite, by alledging that the Debt, to the prejudice of which his Right was said to be granted, was payed, or discharged, or became extinct by compensation; neither of which could be known to the receiver. And yet I find in some cases, this nullity receivable, *ope exceptionis, v. g.* If the right bear, to be for love and favour; for here there needs no Probation that it is fraudulent, and it is a principle, that where the nullity is founded upon Law, and the subsumption is instantly verified, that *eo casu* the nullity is receiveable *ope exceptionis*. And in my humble opinion, where ever the fraud can be instantly verified, it ought to be received, *ope exceptionis*, and the former and ordinary reason, *viz.* That the Disponer should be called, because he may alledge the debt to be payed, seems

not

not to be good, becauſe that nullity is not competent to be propon'd by way of exception, but where there is a competition betwixt the Creditor, and confident Perſons, both pretending right to the Lands and others Diſpon'd, which cannot be but where the Creditor has compriſed; and though before compryſing, the Creditor ought to cite the Diſponer in his Reduction, which is *proceſſus executivus*, and previous to, and in order to execution by compryſing: yet after ultimat execution by compryſing, it is not neceſſar the Debitor ſhould be cited upon that pretence, that he may queſtion the Debt as ſatisfied. 2. I find that Diſpoſitions of Moveables, have been found null by way of exception, though nullities of Heretable Rights are not found null, without Reduction or Declarator, and thus it was decyded, 16. *June*, 1671. *Bower* contra the *Lady Coupar*: The reaſon of which diſtinction muſt proceed from this, *viz.* that *mobilium vilis eſt poſſeſſio*, ὁ τὰ ἄφαντα as the *Greek* calls it, and therefore the Law requires not ſo much ſolemnity to their

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conſtitution, nor deſtitution, or revocation. 3. I find, that where the Right quarreled, is *parvi momenti*, the Lords admit the nullity to be receiveable, *ope exceptionis*, 5 *January*, 1669. But here the parties were poor, which I find they do alſo in nullities *excapite inhibitionis* &c. in ſmall matters, and betwixt poor parties, *nam de minimis non curat lex, & de minimis ſummarie jus dicit prator.* Since there the ſubject matter is not able to bear large expences. 4. I have obſerved, that where the nullities did ariſe incidenter from another purſuit, depending, that there it was received, *ope exceptionis*, leaſt the other Proceſs ſhould fiſt, as was found in the caſe *Haliburton* contra *Moriſon*. Where a Reduction being intented at *Haliburtons* inſtance of *Moriſons* Right, *ex capite inhibitionis*, it was alledged that *Moriſons* Diſpoſition depended upon a Right prior to the Inhibition. To which it was replyed, that that Right was null by the Act 1621. Upon which debate the Lords ſuſtained the quarrelling of this Right, by way of reply. But I ſhould rather think,

think, that where the Right is betwixt moſt confident perſons, ſuch as Father and Son, that *eo caſu* the nullity ſhould be receivable by way of exception, both becauſe the cheat is eaſieſt, and moſt unfavourable: and becauſe the Father, or very near Friend, might have made all concurr willingly to defend the Right, without the neceſſity of being called, which is the reaſon why Reductions are ſo neceſſary in other caſes.

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And in case any of His Majesties good Subjects (no wayes partakers of the Fraud) have lawfully purchast any of the Bankrupts Lands, for a just and competent Price, &c.

IT is much debated amongst the Doctors, if *Actio pauliana* be *Actio realis*, or not. The Gloss and some Interpreters assert it to be only a personal Action: and they conclude so, because the Possessor of what is alienated in defraud of Creditors, is not lyable to this Action, except he be *particeps fraudis*, or else have acquired the thing so alienated without any onerous Cause, that it is not the possession, but the deed of the possessor that is considered. Our Law agrees in this with the Civil Law, for by this Paragraph it is Statute, that all who have acquired the thing alienated in defraud of Creditors, shall

ſhall not be lyable to this Reduction, but ſuch only as are partakers of the fraud, and have not payed a juſt price to the interpoſed Perſon. As for inſtance, one diſpons his Eſtate to his other Brother, without any onerous Cauſe, which Brother Diſpons it again to a Stranger who knew nothing of the Fraud, and who pays a juſt and adæquat price for it. In which caſe, a priorlawful Creditor, may reduce the firſt alienation made to the Brother, but he cannot reduce that alienation that is made by the Brother to the Stranger: And yet if that Stranger did either know that the firſt conveiance was fraudulent (which the Act calls the being partaker of the fraud) or if he payed not an adequat price, then and in either of theſe caſes, the Creditor may reduce even the Diſpoſition made to the Stranger; he is ſaid to be partaker of the Fraud, to whom it was intimate by the Creditor, that he ſhould not buy, *l. ait prætor ff. hoc tit*, which is founded upon excellent reaſons, and would certainly hold in our Law; though I remember not that it is already ſo decyded. For this intimation would take away the *bona fides*, upon which the priviledge

granted by this Act to singular Successors is founded.

But the third parties knowledge, that it was to the behoove of the Bankrupt, or of the confident, is still sufficient to take from him the benefit of his Clause; which being granted, because of the third parties *bonafides*, cannot reach to such, whose knowledge put them in *mala fide*, as was found 22 *January*, 1669. *Hamiltoun* contra *Hamiltoun*, and the *Viscount* of Frendricht.

As also, if the Disposition made to the first receiver, whom this Act calls the interposed Person, did bear love and favour, and was made to a confident Person; in that case, the Right is reduceable. For in that case, the third Person buying ought, to have known the nullity, *& scire, & scire debere equiparantur*; and this was found in the Reduction of a Tack, 1672. *Hay* contra *Famison*. Though that Tack had past thorow many hands, and to singular successors, who had acquired their Rights for onerous Causes.

I have heard it debated, that though a third Person, who acquires a Right from the

the Perſon interpoſed, for an onerous Cauſe, be not lyable to this Action; yet a compryſer, compryſing this Right from the interpoſed Perſon, had no ſuch priviledge. As for inſtance, a Right made by one Brother to another without an onerous Cauſe, is reduceable; and therefore if one of the Creditors of that Brother, to whom the Right was made, ſhould compryſe the Right ſo made to him: It was alledged, that as this Right would have been reduceable in the Perſon of the firſt acquirer, if it had continued with him; ſo it would have been reduceable from the Compryſer; and that for theſe reaſons, 1. A Compryſer compryſes only, *omne jus quod in debitore erat, tantum, & tale*: and therefore ſince it was reduceable in his Debitors Perſon, it ought to be ſo in his, even as it had been reduceable from his Creditor, *ex capite inhibitionis, aut interdictionis*, &c. 2. The expreſs words of the priviledge, given by this Paragraph, does not meet this caſe, for the words run thus; *if any of His* Majeſties *good Subjects, ſhall by lawful bargains purchaſe.* But ſo it is, that he who compryſes, cannot be ſaid

to purchase by way of bargain; but though a compryſing be a legal Diſpoſition, and Aſſignation, yet it is a ſale by the Judge, and not a purchaſe, or Contract amongſt the parties. 3. This caſe ſeems not to fall under the reaſon of the Act; for the Act priviledges ſuch, as having a good ſecurity, do in contemplation of that Right (which for ought they can know, is ſufficient) lay out their money; and ſo follow the faith of that Right in the firſt conſtitution of their Debt. But the Compryſer lent his money to his Debitor, without ſhewing that he relyed upon the Right now quarreled, but finding thereafter that he could not recover his Debt, he compryſed any thing he could find. 4. If this were allowed, it would open a wide door to fraud; for Rights might be made to confident perſons, and then might be compryſed; which any Creditor might be induced to, whereas few would adventure to buy originally theſe Rights, as ſaid is. This caſe was debated in *July*, 1666. betwixt *Fack* and *Fack*, but was not decyded: and it did divide the opinions of very able Lawyers.

It

It may be doubted also, whether the receiver of the Right from the interposed Person, knew not that the Right was fraudulent the time of the alienation, but knew before he received the thing sold, that the first alienation was fraudulent, whether this Right be reduceable or not. And it seems that if he knew either the time of the Vendition, or Tradition, that the Right was fraudulent, that he is *particeps fraudis*, and ought not to have the benefit of this exception; for *traditionibus, & non venditionibus, transferuntur rerum dominia*, and so he cannot be said to purchase a Right, *bona fide*, who knew before Tradition, the fault of the Right Disponed, and he might have kept the price in his own hand till Tradition, and so needed not have been prejudged. Likeas, it is a principle in Law, that *bona fides requiritur in emptionibus, & tempore contractus, & tempore factæ traditionis, l. 2. ff. pro empt. & l. Fin. ff. pro solut.*

Though the Doctors give as a rule that such alienations are reduceable, as are made without an onerous cause, and where

the receiver is *particeps fraudis*? Yet they except two cases from this Rule, First, deeds done in favours of the Fisk, or of a City, or Incorporation, which they declare reduceable, though the receiver was not *particeps fraudis*, *l. 2. C. de debitore Civitatis.* But I think this most unreasonable, nor would it hold in our Law: for as the Act makes no exception in favours of the Fisk, so in *dubio*, *semper contra fiscum respondendum.* And since this third party is only priviledged, because of his *bona fides*, I see not why he should be prejudged by the *Mala fides* of his Author: or why he should loose his priviledge where he can alledge his *bona fides.* The second exception is in favours of a Patron, who might revock the Goods sold, though the Buyer was not *particeps fraudis*, *l. 1. ff. si quis in fraudem patro*: But in that case he was lyable to pay the price, *ibid.* we have no use for this in our Law. And yet by our Law, Masters have no such a *tacita hypotheca*, in the Farms that grew upon their own Ground, that they may reduce any Disposition made thereof, even to a Buyer who was not *particeps fraudis.*

So

So favourable likewise are singular successors, who are not *particeps fraudis*; that a Tack being craved, to be reduced *ex capite fraudis*, as granted and delivered Blank *quoad* the issue or endurance, and in the Blank, eighth years being filled in: Whereas ninteen years were only communed upon; this was found relevant to reduce the Tack *quoad* the Tacks-man, who had acquired Right to the Tack for but not *quoad* a singular Successor, for an onerous cause, without being *particeps fraudis*. First *Decem.* 1671. *Crichtoun* contra *Crichtoun* and *Hannans*: and a Disposition being craved to be reduced, as granted by a person who was only a trusty, having given a Back-band; the Disposition, though made as said is, to a singular Successor, was found to be reduceable, if the Right was made without an onerous cause; or that the singular Successor knew of the Disponers Back-band; though it was but a personal obliegement, and not in *gremio juris*; and consequently could not in Law have otherwise affected a singular Successor. 20 *Novem.* 1672.

1672. *George Workman* contra *John Crafurd.* And it has been often found in our Law, that though gifts of Escheat, taken to defraud Creditors. be reduceable in the persons of such as took them; yet they are sustained, when establisht by assignations in singular Successors, no wayes partakers of the fraud: And an Assignay is not in Law obliedged to suffer his Cedent to swear in his prejudice, if his Assignation be made for an onerous cause; but if either the Assignation be granted without an onerous cause or be made upon design to preclude the Debitors from these just remedies: then whatever is competent against the Cedent, is competent against the Assignay; so that we may establish this general rule, *viz. participes fraudis*, have never the priviledges competent to singular Successors.

If the Disposition has been made by the interposed person, for payment of a price, but the price is not equivalent to the thing sold, then in so far as the thing exceeds the price, the Disposition will be reduced, but it will stand in *quantum*; it exceeds even as a Disposition made to a con-

conjunct person, will be valid in so far as it is onerous, for in either of these cases is the Disposition absolutely revockable. But either the conjunct person in the one case, or the singular Successor in the other, will be obliedged to make up the true and just price, as was found in the former case, *Henderson* contra *Hendetson*, and the 12. *June*. 1632. *Skeen* contra *Betson*, which is likewise more fully clear by these words of the Act, *viz.* providing alwayes, that so much of the saids Lands, Goods or Prices thereof, so trusted by Bankrupts to interposed persons, as hath been really payed, shall be allowed unto them, they making the rest forth-coming to the remnant Creditors: and the reason of this is, because the Law did not absolutly oppose the alienation, but only did reprobate it, in so far as it was done to the prejudice of Creditors. And therefore, the Law resolving not to pursue its revenge, further then its design, did reasonably ordain, that these Dispositions made in defraud of Creditors, should only be quarrelable, in so far as the price was not equivalent. This is likewise fit

for

for Commerce; which is never restrained in so far as is absolutely necessary: and this is very suitable to the Analogy of Law in other cases; for thus, according to the common Law, he who had taken an obligation for more Annual-rents then the Law allowed, did not thereby loose all his own Annual-rents, but only looſed them in so far as they exceeded the *quota* prescrived by Law, *l. Placuit ff. de usuris.* And a Donation bearing a greater summ then the Law allowed, when the Donation was not insinuated or Regiſtrated, did not loſe the whole, but only *quatenus superat definitionem legis l. sancimus, C. de donat.* And in our Law, though it be by expresse statute appointed, that Tacks set by inferior beneficed persons, without the consent of the Patron, for longer then three years, shall be null; yet *quoad* these three years they are still sustained, and are not annuled *in totum.* And albeit by another Statute, all Bands and other Writs not subscribed by the party, or two Nottars for him, be declared null, if exceeding one hundred Pounds. Yet though granted for a greater

summ

ſumm, it will be valid, if he to whom it was granted reſtrict it to an hundred Pounds: And though Witneſſes can prove nothing above an hundred Pounds; yet though the ſumm craved be greater, the purſuite will be ſuſtained to be proven *pro ut de jure*, if reſtricted to an hundred Pounds. And yet I confeſs; that theſe Arguments from Analogy, do not in this abſolutly hold, for in ſeveral of theſe inſtances, the deeds ſpecified *habent individuam, formam*, preſcribed to them by the Law, *& ubi actus eſt individuus, ratione formæ, ea non ſervata, actus omnino corruit, & utile per inutile vitiatur*. But the Arguments taken from Donations, *& ab uſuris quadrat* with this caſe or at leaſt the Argument *ab uſuris* does.

But the receiver of the Price ſhall be holden to make the ſame forth-coming to the Bankrupts true Creditors, for payment of their lawful Debts.

THough the interpoſed Perſon be *particeps fraudis*, yet he is not by the Act, lyable to reſtore the Land, or others diſponed to him ſimply, or the price thereof, if he has diſpon'd, the ſame to a third Perſon. But there will be deduced, or allowed to him, ſo much either of the Land, or price, as he has given, or payed to lawful Creditors: and the ſuperplus is to be forth-coming to the other Creditors, who wants their due payment; and that not without new diligence, by theſe who have reduced the Right granted to the interpoſed Perſon, by Arreſtment, or otherwiſe. But if the Creditor who has prevailed in the Reduction, had not done diligence to affect the

the Land, or price, in the hands of the interposed Person, either by Comprysing, or Arrestment, he must notwithstanding the Decret of Reduction, affect the same: Otherwise, other Creditors doing diligence, will be preferable, seeing Reductions do not settle a Right upon the Creditors to their Debitors Estate, but they only sweep away such fraudulent Rights, as may stand in the way of their diligence, and execution; and hinder them thereby to get a Right to the Debitors Estate.

And

And it shall be sufficient probation of the Fraud intended against the Creditors, if they, or either of them, shall be able to verifie by Writ, or Oath of the party receiver, that the same was made without any true Cause, &c.

FOr clearing of these words, it is fit to know, that the word *Fraud*, is variously used by Lawyers; it is taken *pro pœna capitali, l. eum autem ff. de Ædilit edict. pro periculo alicujus in commodi, l. 1. ff. ad l. falcid pro impostura, l. aliud est fraus ff. de reg. jur. pro privatione juris l. 2. ff. de his quæ intest delen*: But here, *Fraud* signifies the prejudice arising to the Creditors by unlawful alienations. And even in the Civil Law, it was taken sometimes *pro damno pecuniario. l. is ff quæ in fraud credit.* And he is said to de

fraud

fraud his Creditor, who prejudges him by that Alienation, without neceſſity of proving any previous deſign of cheating; for that deſign being a ſecret and latent Act of the mind, the Law which deſigned mainly the indemnity of the Creditor, would not burthen him with ſo narrow, and difficult a Probation. But *preſumptione juris, & de jure,* concluded that Alienation to be made in defraud of Creditors, which wanted an onerous Cauſe: and this is *fraus in re,* though not *in conſilio.* And Lawyers have well diſtinguiſhed, *fraudem in re, a fraude in conſilio, Accurſ. ad §. in fraud juſt. quib. ex cauſ. manum.* which is ſuitable to the diſtinction uſed by the Law it ſelf, in the Title, *de dolo. inter dolum ex propoſito, & dolum ex re ipſa:* for *fraus, & dolus,* differ only, as *genus, & ſpecies. Fraus* being more general then *dolus*, as is fully proved by *Bargalius, de dolo lib. 5. c. 4.* But albeit the Civil Law makes Alienations *in conjunctam perſonam*, to be only ſufficient probation, *ſi aleæ preſumptiones concurrant, l. ſi quis C. de bon. damnat. Burgal, de dol. c. 8. l. 5. num. 43.* Yet our Law makes the

want of an onerous Cauſe, *per ſe*, though nothing concur, to be a ſufficient probation of the Fraud, againſt a conjunct, or confident Perſon. And albeit by the Civil Law, *fraus, & eventum, & conſilium deſiderat.* η απατη και αποτελισμα, και γνωμη ενδηται. *Baſil. l. 15. h. 1.* Yet our Law requires only *fraudem ex eventu*, without conſidering whether there was *fraus in conſilio*; for albeit he who received the Diſpoſition, knew not that the Diſponer had Debt, or Creditors: Yet if the Eſtate of the Diſponer was not able to pay his Debt, our Law will reduce that Diſpoſition, if made without an onerous Cauſe; which is alſo expreſly contrair to *l. 6. §. 4. baſil. h. tit. quæ in fraud. cred.* ο εν ειδοτι το απατασθαι τους δανειστας ωσιον τι προς βλαβην, υποτιθεται ουχι ο αγνοων. What probation ſhall be ſufficient in Reductions, upon this Statute, is determined by this Paragraph; and though the Statute appoint the probation to be by the oath of the party receiver, or by writ, bearing no onerous Cauſe, or bearing to be for love and favour; yet the practiſes has in this point ſo varied, that it will be fit to reduce your preſent deciſions into theſe concluſions. 1. Narratives

tives, bearing the Diſpoſition to be for true and onerous Cauſes, being but the aſſertion of the party granter, does not prove the Cauſe to be onerous; elſe it would be very eaſie to elude the Act. 2. Though the Narrative does not prove for the granter, yet it proves againſt him, *nam verba narrativa*, as *Craig* obſerves, *pag.* 145. *licet ſepe falſiſſima probant tamen contra proferentem*. And therefore, if the Diſpoſition quarrelled, be made to a conjunct Perſon, and bear to be made for love and favour, it will be reduced, that though the Perſon to whom it is granted, ſhould offer to prove the onerous Cauſe, as was found in the caſe *Stewart* contra *Graham*, nothing can prove better the deſign of the parties, then a writ under their own hands; for as this cannot fail, ſo if the receiver ſhould be allowed to lead a ſubſequent Probation, for proving the onerous Cauſe, contrair to the writ produced, it is very probable, that he might uſe indirect means for proving the ſaid onerous Cauſe, and this might both diſappoint the Creditors, and open a door to Perjury; *& ſibi imputet*, the purſuer who accepted of a writ,

bearing ſuch an Narrative. 3. A Right made by very conjunct Perſons, ſuch as Father and Son, are made to Perſons againſt whom there lies a preſumption of Fraud, either becauſe of the relation, or becauſe the receiver had no viſible Eſtate, wherewith to acquire *ex titulo oneroſo*, the Right diſponed in that caſe, though the Right bear an onerous Cauſe: Yet the receiver muſt prove the onerous Cauſe, otherwiſe then by the Narrative. 4. If the Diſpoſition bear, that the ſame was made for ſatisfying of Debts, owing by the Diſponer, or for ſatisfying a Debt owing to the Receiver: he muſt prove the onerous Cauſe; as was found 23. *March* 1624. *Duff* contra *Cullodin*, though the Diſpoſition there, was made only to a Brother in law, and the reaſon of this ſeems to be, becauſe if there was any antecedent Debt, that Debt may be eaſily proven; and the Lords have proceeded, ſo far according to the preſumptions of Fraud, which have appeared, that where Bonds have been produced, proving the Diſponer to be Debitor, prior to the Diſpoſition; they have yet ordained the onerous Cauſes of theſe Bonds

Bonds to be proven. Becauſe if confident perſons deſign to cheat their Creditors, they may as eaſily grant Bonds bearing borrowed Money: and then Diſpoſitions for payment of theſe Bonds; as they may ſimply grant Diſpoſitions bearing onerous Cauſes. And as a Minors Diſpoſition would not be found proven to be for an onerous Cauſe, though granted for payment of a preceeding Bond, ſo neither ſhould a Diſpoſition granted by a Bankrupt; for a Bankrupt is as prone to cheat, as a Minor is to be cheated. And therefore, if the preſumptions of fraud be very ſtrong, they will ordain the party receiver to inſtruct the onerous cauſe, even of the preceeding Bond, by the parties who received, and the Witneſſes who were preſent; or elſe will ordain the concealed Bands to be produced, or at leaſt the party receiver to depon thereupon, as was found, *December* 1671, *Duff* contra *Brown*, and *December* 1773. *Campbell* againſt *Campbell*. In which laſt caſe, a woman being Creditrix by her Contract of Marriage, as being provided to the half of the Moveables which ſhould

pertain to her Husband, the time of his Death, and to 200. Merks out of the other half, purſued Reduction of a Diſpoſition made to her Husbands Brother of his Moveables, who defending himſelf by a Diſpoſition, made for an onerous cauſe, *viz.* A Bond granted by his Brother to him, it was urged, that the Brother to whom the Diſpoſition was made, ſhould prove the onerous cauſe of that Bond, for though the Bond bare onerous cauſes, yet it is eaſie by ſuch Bonds to cheat Creditors. And it was preſumeable in this caſe, that the Bond was not granted for an onerous cauſe, ſince payment of Annual-rent and Execution was deferred till the granters death. Notwithſtanding of which preſumption, the Lords allowed the receiver to give his Oath upon the onerous cauſe: eſpecially ſeeing it was ordinar for Brothers to ſpare their Brothers, both as to Annual-rent, and as to Execution: And much more when the Brother who granted the Bond was ſick, and would die ſhortly in all humane probability. Nor did they think fit to burden the receiver with other Probation

tion of the onerous cauſe, ſince the Diſpoſition bare to be for onerous cauſes, and the Bond was produced, bearing to be for onerous cauſes alſo. So that to requite a higher Probation backward, was *dare progreſſum in infinitum.* And it was well known that Brothers have ſuch private Tranſactions, Truſts, and Lendings, that they pay and receive Money, to, and from one another, without Witneſſes. 5. When Bands are granted to Trafficqueing Merchants, who are Brothers in Law, or ſuch Relations as are known to be men of integrity; it is hard to put them to prove the onerous cauſe, otherwiſe then by their Oath, for Merchants and others uſe to adhibite Witneſſes to all their Bargains, and in many caſes they cannot have Witneſſes to their Bargains, being made abroad, and in Remote Countries; and to tye them not to make Bargains with their near Relations (with whom ordinarily they enter into Societies) were to ruine all Commerce. And though Moveables uſe to be Diſpon'd without Writ, nor does the Law require any Writ to their tranſmiſſion; yet in the former caſe of *Anderſon,*

ſon, the Lords forced him to prove the onerous cauſe of his Diſpoſition to *Howats* Moveables, though he alledged that he could be in a worſe condition by his having a Diſpoſition, then he would have been without it: but ſo it is, that his Right to Moveables would have been ſufficient without Writ; but here there was a Diſpoſition, but where there is no Diſpoſition, it were hard to reduce a Right made to Moveables, becauſe I could not prove the onerous cauſe. As for inſtance, if I bought a horſe, and payed the Money, no Creditor of the Sellers could force me to prove the price to be payed. *6.* Sometimes the Lords uſe to ſuffer the receiver, to aſtruct the onerouſneſſe of the cauſes, by one or moe Witneſſes, and to give their Oaths in Supplement, and according as the relation is remote, or the preſumption of the receivers honeſty ſtrong, they leſſen the neceſſity of the ſtrong adminicles. And thus the 5. *July* 1673. In the caſe of *Margaret Home contra Smith*, they ſuſtained one Witneſs, deponing that he was Witneſs to ſuch a Bond, and that he heard the granter of the Bond acknowledge that he

was

was Debitor, to be ſufficient adminicles, being joyned to the Defenders Oath of Supplement. And in the caſe above cited, 18. *November* 1669. *Anderſons* Diſpoſition being quarrelled, as being *omnium bonorum*, and for a falſe cauſe, a great part of the ſumm for which it was granted, being payed before the Diſpoſition, yet the Lords ſuſtained the Diſpoſition in ſwae far, as it was granted for Summes owing before the Diſpoſition, to be proven by the Oath of *Anderſon* himſelf, and of the perſons to whom the Money was payed, and for what Summes were payed before diligence at the purſuers inſtance, though after the Diſpoſition, to be alſo proven by the Oath of the common Debitors, and of theſe to whom the Debts were payed: And yet where the Diſpoſition did bear, to be not in general for payment of the granters Debts, but particularly for payment of the Debts after ſpecified, and ſome of the Debts being filled up with new and different Ink, the Lords would not allow theſe Debts, except the Defender would offer to prove, that theſe Debts were filled up before the purſuer did diligence as a Creditor, after which time, there

there being *jus queſitum* to him by his diligence, as no Diſpoſition could have been made to his prejudice, ſo neither could he be prejudged by filling up other Creditors names, then theſe contained in the firſt Diſpoſition; for elſe it were eaſie to cheat all Creditors by ſuch Blanks. And yet here it was offered to be proven, that it was communed expreſly, at the very time of the granting of the Diſpoſition, that theſe Debts ſhould be payed which was alledged to be ſufficient, being propon'd in fortification of the Diſpoſition, which was prior to the Creditors diligence, 15. *January*, 1670. Lady *Lucie Hamilton*, againſt the Laird of *Dunlap*, and others.

Theſe remarks may reconcile the contrair Deciſions that are to be found upon this head, ſuch as the 22. *January*, 1630. *Pringle contra* Mr. *Mark Ker*. Wherein the Lords found no neceſſity to burden the Purſuer, that he ſhould prove a true and onerous cauſe, otherwiſe then by his own Oath, becauſe as is there obſerved, when parties borrow Money or Contract mutually, there is no other way to prove the bor-

borrowing or Contracting, but by the Writ then made and found expreſly, that this was not a Negative which proves it ſelf. And yet upon the 12. *February*, 1622. It was found that this part of the Act of Parliament was a Negative, and proved it ſelf.

It ſeems likewiſe, that if the party who made the Right, was not able to pay the Debt otherwiſe, that then the Probation ſhould be ſo much the ſtricter: And though the Oath of the receiver ſhould not be taken as a full Probation, yet if the receiver of the Diſpoſition have in any former purſuit, been forced to depon upon the onerouſneſs of the Cauſe, that Oath ought to purge any preſumption of fraud; for though that purſuit ſhould not bind any other then the perſons who were Purſuer or Defender there, as what was *inter alios acta, quæ aliis non nocet*, yet the receiver having been put to ſwear, ought to have this advantage alſo, as he had that trouble. And that Oath being upon the ſame ſubject-matter, it ought to be ſtill much reſpected; eſpecially ſince this Oath is only required to clear the Judge, as to the

the truth of the Debt, and as to the onerousneſs of the Cauſe.

Whether a Diſpoſition procured by a Tutor to his Pupil may be quarrelled, as granted in defraud of lawful Creditors, and how the fraud may be proved, in that caſe may be doubted, for it may ſeem, that no mans Right can be taken away, without ſome Act of his own, and the Tutors Oath cannot prejudge his Pupil, for a Tutor may make his Pupils condition better, but cannot make it worſe. And yet there may be two diſtinct caſes conſidered here, one is, if the Diſpoſition be granted without an onerous Cauſe; and there is no doubt but ſuch Diſpoſitions may be quarrelled, for if the Minor cannot inſtruct an onerous Cauſe, his Diſpoſition is null; and there ſhould be no difference as to this, betwixt Majors and Minors: And in this ſenſe is to be underſtood, *l. 6. §. 10. h. t. Si quod cum pupillo geſtum eſt, in fraudem creditorum, Labeo ait, omnino revocandum eſſe quia pupilli ignorantia non debet eſſe captioſa creditoribus, & ipſi lucroſa*, which agrees with *l. 6. §. 6. Baſil. h. t.* though it be the more

more general ει πρὸς ανηβον πραχθη τι επὶ περιγραφη ανατρεπεται. The ſecond caſe is, when the Tutor payed a Price in the Pupils name, but knew it was granted to defraud the Diſponners Creditors, it ſeems that though a Tutor cannot depone upon Rights not acquired by the Tutor himſelf, yet in Rights acquired by himſelf he may depone, and his Oath acknowledging the the fraud ſhould annul the Pupils Right acquired by his Tutor, for *quem ſequitur commodum, eum ſequi debit incommodum:* and that there is no reaſon the poor Creditors ſhould be prejudged by inſerting the Pupils name, but he ought to purſue his Tutor. But yet I incline rather to think, that if any Tutor knowing that ſuch a Debitor was to defraud his Creditors, did lend out my Money to buy Land in my name; that though his being partaker of the fraud might have annulled this Right, if it remained in his own perſon, yet his fraud being meerly perſonal, cannot prejudge me who was innocent, no more, then if my Factor ſhould collude with ſuch a Debitor, would his colluſion prejudge me. And ſo neither of their Oathes can prove againſt

against me, for their fraud is not relevant against me, except in so far as I have received advantage by the fraud of my Tutor, or Factor: In which case, deeds either done by the Minors self, or by his Tutor, are reduceable at the instance of lawful Creditors. *l.* 10. S. 3. *Basil. h. t.* ἐαν κηδεμόνος εἰδότος ἀγοράσωσιν τι παρ' αὐτῶν ὀφείλοντες εἰς ὅσον ἐγένοντο πλείονος παρ' αὐτοῖς πλάττονται. But if Minors sell any Lands in defraud of their Creditors, then if they sell without the consent of their Tutors or Curators, the alienation will be *ipso jure* null, and so needs not be reduced: But if the Disposition was made with the consent of Tutors and Curators, though it be reduceable upon minority and *Lasion*, yet the Minors Creditors cannot raise a Reduction, *ex hoc capite*, for that reason is personal, *nec egreditur personam minoris*; but the Creditor in this case must comprise the Right or action competent to the Minor, and as having Right to the Action in manner forsaid, he may reduce the deeds done by the Minor.

Whether a Defender in their Reductions *ex capite fraudis*, may be forced to depone

depone whether he was *particeps fraudis*; my be doubted, and it appears that he cannot, for he being partaker of the fraud, by this Statute diffames all such as are guilty of it. And by our Law, no man is obliged *jurare in suam turpitudinem*. But yet I find, that the Lords have, *ex nobili officio*, obliegeded parties to be examined upon their accession to such contrivances, 7 *Febr.* 1673. Dame *Elisabeth Burnet* contra Sir *Alexander Fraser*. And even in Improbations, they examine, *ex officio*, the parties who are alledged to be Authors; though the hazard be greater there, then in thir Reductions. And seeing reasons of circumvention are referred to Oath, why may not the being partaker of the Fraud, be referred to Oath? if the Lords, and His *Majesties* Advocat, declare, that the deponers Oath shall not infer, *infamiam juris*, against him, which is a Criminal punishment; without which be secured to him, I conceive he is not oblieged to depone.

It may seem, that the Action of Reduction, founded upon this Act, against such as are partakers of the Fraud, should

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not prescrive, because this is a cheat which the Law ought not to maintain, nor assist, and this should no more prescrive, then *actio falsi dos*; whereof this cheat seems but a branch, or which at least, it does much resemble. And by the Cannon Law (which as *Craig* observes, we prefer to the Civil Law in *Scotland*, where matters of Conscience are considered) he who is in *mala fide*, cannot prescrive, *c. fin. de prescript.* And to allow the partaker of the Fraud a security of prescription, were to tempt him to cheat. Notwithstanding of all which, certainly all actions upon this Act would prescrive: for neither our Act 28. *Par.* 5. *J.* 3. Which appoints the prescription of moveable Rights, nor the Act 1617. Which introduced prescription in Heretable Rights, makes any exception in favours of this Action. And our Law being desireous to secure all Persons in general, has drawn these Acts very comprehensively, *& sibi imputent*, such as are prejudged, who suffered so much time to elapse without diligence. Likeas the Civil Law, which considered *mala fidei possessores*, with

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a very unfavourable eye, does allow the benefit of even 30 years prescription, *mala fidei possessori*, for the same reason, as is clear, C. *de. prescript.* 30. & 40. *annor.* And the same is observed in *France*, *Guid. Pap. quest.* 199. And though we observe the Cannon Law, in case of Marriage, Teinds and such like, which are somewhat Ecclesiastical by their own nature; yet in prescriptions which had their original from the Civil Law, we follow the dictats of that excellent Law.

Or the most part of the Price thereof was converted, or to be converted, to the Bankrupts profit and use.

ANother presumption of the fraudulent Disposition of the Bankrupts Estate, is, if the price of the Debitors Estate was converted, or to be con-

verted to the Debitors own use, and profit. And this proceeds upon the same reason, whereby the Rebels Escheat is declared null, if he be suffered to remain in Possession, Act 145. *Par.* 12. *Ja.* 6. And as by that Act, the suffering the Rebels Wife or Bairns to remain in Possession, is equivalent, as if the Rebel himself remained in Possession; so if it can be proven, that the price of the Debitors Land was applyed to the behove of his Wife, and Children; I conceive it is equivalent, as if it were converted to his own behove, though this Act do not expresly bear it.

Upon this part of this Act, arose lately the ensuing debate; *Hermistoun* being obliged to pay the Lord *Sinclar* 8000 merks as an Annuity, and for his Aliment: This obligement was assigned to *John Watt*, and was by him transferred to *George Cockburn*, who did pay several Debts for my Lord, but finding that his payment might thereafter be challenged by my Lords Creditors, as made in prejudice of them who were prior Creditors, he did take the gift of my Lords Escheat, and gave a back-

bond

bond to the Exchequer, wherein he oblieged him to compt at the sight of the Exchequer, for the superplus that exceeded the payment of the Debt truely payed, or to be payed by him, for my Lord. The Creditors having quarrelled those payments upon this act, 1621. as made to their prejudice, because though it was free to the Exchequer, to gift my Lords Escheat, and to burden it with any back-bond, yet this gift was granted truely to *George*, in contemplation of his former Right; which former Right was null, as made to defraud them, and for the use of their Debitor; and the Right made to him was null by this clause, of this Statute, by which all Rights made to any Person, are presumed fraudulent, if the price be converted to the behove of the Debitor: and if this were allowed, poor Creditors might soon be cheated by so easie contriveances. And though His *Majesty* may prefer a Donator to the true Creditor, where that is chiefly designed by His *Majesty*, yet where the gift is taken only by a Person who had formerly defrauded Creditors, meerly to palliat the fraud, in that case, the gift *laborat eodem vitio*, being also taken for the behove

of the Debitors, and so is null by the former Act 145. *Par.* 12. *Ja.* 6. But this was repelled, because the Lords found, that whatever might be said against the former Right, upon this Statute, yet the gift of Escheat did sufficiently defend him, for since any Superiour might allow an aliment to his Vassal, being Rebel, and might grant his liferent Escheat for that effect, why should not this liberty be allowed to the King, 3. *December*, 1674. But if this gift had not interveen'd, it seems uncontraverted, that the obliegment to pay *Sinclars* Debts, though undertaken prior to any Action at the Creditors instance, was not sufficient to defend the undertaker against prior Creditors, for the Right being at first quartelable at their instance, as done in defraud of them; it being a Right made for the behove of the Debitor: it could not thereafter convalesce, by undertaking the Debitors debts. For it was all one to pay the Money to *Sinclars* Debitors, as it would have been to have payed it to himself. And if the Money had been payed to my Lord, to the end he might have payed them, the payment

ment might without doubt have been quarrelable. And yet a deed once quarrelable may thereafter convalesce, if their was no Fraud in the first contriveance, *v. g.* If an Uncle should Dispone his Estate to his Nephew, who knew not of his being insolvent, this Right might be Reduced upon this Statute. And yet if thereafter, the Nephew should *bona fide* undertake the Uncles debts, before any diligences done by the Creditors, his Disposition would be sustained in so far as true Payment was made.

They making the rest forthcoming to the remnant Creditors who want their due payment.

SInce by this Act, the Disposition made by a Bankrupt to one who was partaker of the Fraud, is reduceable; so that the buyer will be forced to quite

the Land, or thing bought fraudulently to the Bankrupts true Creditor: It may be doubted, whether the buyer, though partaker of the fraud, will get repetition of the price truely payed by him, from the Bankrupt to whom he payed it. And it may be argued, that he would not, because first, the Law never authorizes, nor lends its assistance, to recover what is due by fraudulent, and unworthy obligations, for there it behoved to be the Minister of Iniquity, and to serve Vice in a mean, and sordid way, *& ubi dantis, & accipientis turpitudo versatur, cessat repititio. l. 2. ff. de condict. ob. turp. caus.* 20. The buyer in this case cannot complain of the Law, since he knew the hazard, and yet run upon it. 3. This were to invite men to commit cheats; whereas to deny them action of repitition upon the eviction, were a ready mean to deter them, since the hazard would be so great. 4. This may be further clear, *l. 1. C. de prescr.* 30. *annor. & l. hi qui C. de rescind. vend. & l. fin. C. de litig. & l. si fundum stiens. C. de evict. & l.* 25. *Basil. de reb. auth. jud. pos-*

sidend, φησιν ο πρατος, μη συναλλαξω σοι ειδως οτι περιγραψαι θελεις τους δανειστας σου, ουκ εχω κατα των πραγματων σου απαιτησιν. But yet the contrair, *viz* that the fraudulent buyer ought not to have repetition from the Bankrupt Seller; may be urged by these reasons, First, Crimes and Frauds are extinguished by mutual compensation, and therefore, since as the Buyer would have had an action of eviction, if no fraud had interveened, so ought he to have the same action where the fraud is mutual, for there it is in the same condition, as if had never been; for it is extinguished, *l. viro. ff. solut. matr.* 2. If the Seller should not be oblieged to restore the price, he should gain by his own cheat, for his Creditors would be payed, by prevailing against the buyer, and he would retain the price. 3. Where the buyer and seller are in the same condition, his condition is most favoured by the Law, who seeks only to secure himself against loss; *in pari casu melior est conditio ejus qui certat de damno vitando, l. non debet ff. de reg. jur.* And this is also clear, *per l. 3. C. de his qui vi metusve caus. & l. fin. C. Common*

mum de legat. I would rather perhaps incline to think, that becauſe both have offended, therefore both ſhould be puniſhed; the one by being oblieged to refound the price received, and the other by not getin git, though refounded: But that he ſhould ſee it confiſcated by publick authority, like the Legacies left to unworthy Perſons, who are uncapable of them; for theſe remain not with the Teſtator, nor yet go to the Legator, but *fiunt caduca*, and belong to the Fisk.

It may be here doubted, if in theſe Reductions, the defender who is to reſtore what is diſponed to him, will be oblieged to reſtore the fruits of the thing ſold, and whether he will be oblieged to reſtore them from the date of the ſentence, or from the time of Litiſconteſtation, or from the Citation. The Civil Law *l.* 25. §. 4. *F. h. t.* ordains not only the thing it ſelf to be reſtored, but the fruits which were upon the ground at the time of the alienation, and theſe which were reaped after the action was intented, *non ſolum autem rem ipſam reſtitui oportet, verum &*

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fructus qui alienationis tempore terræ cohærent, quia sunt in bonis fraudatoris. Item eos, qui post judicium inchoatum recepti sunt medio autem tempore præceptos in restitutionem non venire. But the *Basilicks* differ somewhat, for they say, *qui post litem contestatem percepti sunt.* As *Fabrot* translates them, μετα προκαταξιν λογου ω. But these may be reconciled, because though in our Law, Litiscontestation is only made by the decision of the points in *jure*, and the assigning a day to either party to prove, whereupon an Act is extracted: yet by the Civil Law, Litiscontestation was made how soon the Defender denyed the thing craved, and so *judicium inchoatum* differed little with them, from Litiscontestation.

Our Senate observe as a general rule in all Reductions, to decern fruits to be restor'd from the time that the possessor knew that his Right was not valid: and therefore when it was palpably unjust, they use to decern from the date of the citation, but not from the citation upon the first Summonds, because these are but indorsations, where Copies are seldom truly

ly given, and so the Defender could not thereby be put in *mala fide*. This was so decided, *Howison* contra *Gray*, *February* 1672. And yet this seems to authorize the belief that citations upon first Summonds may be false, whereas since the Law commands them, it ought to believe them, and so punish the forgers, rather then discredit the form. If the nullity depend upon a debateable point, they decern from the Litiscontestation, because that nullity was not clear till then, *v. g.* if a Disposition were quarrelled as made to a Brother in Law, and he alledged that the Act extends not to Brothers in Law, if the Lords found the Statute to extend to Brothers in Law, *to casu*, if it were referred to the Defenders Oath, the Lords use to decern from the Litiscontestation, because after that the Defender could not doubt of the nullity of his own Right, though before he might have doubted. But if the nullity depend upon extrinsick probation, which the Defender could not know before sentence; as for instance, if it should be denyed by Act of Litiscontestation, that the Debitor became, and was insolvent;

vent; the Defender could not be in *malæfide* till this were found proven, and so ought not to be lyable in *fructus*, till sentence.

I conceive that these generals may be likewise particularly applyed to this Statute, by considering three different cases, relative to the three different parts of this Statute.

The first is, that of the first part of the Act, by which all Dispositions made to confident, or conjunct persons, in defraud of lawful Creditors, without an onerous Cause, are so reduceable, that the alienation being reduced, the fruits extant are to be restored from the time of the intention of the cause, and not only from the time of Litiscontestation. And yet it would appear, that all the bygone proffits, or fruits, ought to be restored; not only from the time of the citation, but from the date of his possession: Because, 1, By the expresse words of the Statute, all such alienations are declared to have been null from the beginning, and so are in the same case, as if they had never been made. But so it is, if they had never been made, the Possessor behoved to have restored all

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the fruits, whether extent, or not, and even from the time of his poſſeſſion. 2. This ſeems moſt reaſonable, for the Law having dicharged ſuch alienations, he who Contracts in ſpight of, or to cheat the Law, ought not to be protected by it; and if the Debitor might thus prejudge his Creditors, for it is a prejudice to them to want the fruits and profits of their Debitors Eſtate, from the alienation, till the time of intenting an Action, which poverty, or abſence, ignorance, or latency of the deed, may keep them from intenting: and which may be very conſiderable and were it not abſurd, that a gratuitous Diſpoſition of an Eſtate, often thouſand Merks by year, ſhould carry the receiver to five or ſix years rent, extending to 50000. Merks, becauſe theſe Rents were intrometted with prior, to the intenting of any Action of Reduction, and yet the Eſtate ſhould not be able to pay all the Debts due to the many poor Creditors, who are Purſuers of the Reduction.

The ſecond caſe is, where the Diſpoſition was made to one who was *Particeps fraudis*, and he is to reſtore even all the profits

profits from the date of the alienation, whether they be fruits occasioned by his own industry, or brought forth by the nature of the thing possest. For he who was partaker of the fraud, is *malæ fidei* Possessor, and such are still discerned to restore all, *fructus extantes rei vindicatione; & consumptos conditione sine causa, l. 3. C. de condict. ex leg.* nor ought he in reason to reap advantage by his own cheat: and as he cannot blame the Law for severity to him, since he occasioned his own losse; so the Creditor might complain that such as cheated the Law, and him, were enriched by his loss. And the reason why *bonæ fidei possessor facit fructus consumptos suos*, is, because he not knowing but these profits were his own, thought he might live accordingly, this reason is wanting in him who is partaker of the fraud, for he knew that these profits belonged to others, and so should not have spent them. And though it may be alledged, that all Dispositions made to confident, or conjunct persons, are reduceable by this Act, as fraudulent, and therefore the receiver cannot be called *bonæ fidei* Possessor in no case

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for nothing is so contrair to *bona fides*, as *Fraus*. It is answered, that a Disposition may be made to a conjunct person, who knew neither that the Disponer had Creditors, or that his Estate was not able to pay them, and *Fraus ex eventu*, as I observed formerly, is not *Mala fides*.

The third case, is of Creditors who got a Disposition from the common Debitor for payment of their Debt, but it is reduceable at the instance of other Creditors, who have done diligences; and these, I think, should according to the rules of Justice, and Reason, be only obliedged to restore the profits of the thing so dispon'd from the date of the sentence: for since they are more favourable then a conjunct person, who gets a Disposition without an onerous cause, and that he *lucratur fructus ante citationem perceptos*, they ought to have more favour. But I have not heard this debated, nor decided, and it is generaly believed that they would be lyable after citation, but if he hath *dolose* received payment, and was *particeps fraudis*, even he, though a Creditor ought to restore all the profits re-

received

ceivd by him from the time of his possession. In all which restitutions the restorer will have detention of the profitable expences bestowed by him, whether he be *bona fidei*, or *malæ* Possessor *l.* 5. *de rei vindicat.* ὑπεξαιροῦνται μὲν τὰ ἐν αὐτοῖς ἀναγκαῖα δαπανήματα. *Basil. l.* 10. §. 14. *h. t.* To which there is also added, καὶ τὰ κατὰ γνώμην τῶν δανειστῶν γινόμενα. *Et siquæ aliæ ex creditorum voluntate factæ sunt.*

The Civil Law ordained the fruits that were upon the ground, the time of the Disposition, to be restored, though these were consumed before citation, *l.* 25. §. 4. *h. t.* Because *fructus pendentes*, were *pars soli*, and so were to be restored; but this has not been craved with us: and since they use to be *bona fide* spent, there is no reason to restore them more then other fruits. I have heard it contraverted, whether a person to whom a Disposition is made in defraud of Creditors, may when that Disposition is reduced, pursue by way of Action, for the expenses he bestowed necessarily in reparing the Lands, or houses disponed; and it may seem that this being once a Debt due to him, it can-

cannot be taken away but by a Discharge: and yet Lawyers are clear, that though such expenses may be retained, or that the Defender in such Reductions may alledge that his Right cannot be reduced, till all his expenses be repayed. Yet if he suffer his Right to be reduced without proponing upon his expenses, and meliorations, then he seems to have past from them. For the Law presumes, that if he had any thing due to him, he would have craved it before he was dispossest: And albeit the *scolion ad l. 28. tit. Basil. de sumptibus in re aliena factis*, asserts this only *de malæ fidei possessore*, μη συμβαλλεσθαι το προσωπον την τε δολω παραγραφην ει οις απαιτει τα δαπανηματα εχων, παρακατασχεσιν. & *l.* 46. *ibid.* ! this is also asserted *de bonæ fidei possessore*, ὁ καλη πιστει ου εδαπανησεν γην ουκ εχει, αλλα παρακατασχεσιν which agrees with *l. sumptus de rei vind. & l. si in area de condict. indebit.* But yet it is the opinion of some eminent Lawyers with us, that even after the Right is reduced, the person to whom the Right is made, may recover payment of what he necessarily bestowed even by way of Action: and *Molineus ad consuetud. parisiens. t. 1. gloss.*

gloss. 5. Is of their opinion, and asserts that the present customes of all Courts have receded as to this from the Civil Law, and yet it may seem in our Law, that this is competent and omitted, and so should rather be allowed in our Law, then in the Civil Law, especially seeing this is of the nature of compensation. For when the Pursuer craves the thing disponed to be restored, with the fruits and interests: it seems to be a sufficient ground of compensation, or at least an exception *qua sapit naturam compensationis*, that the Defender bestowed as much upon the thing craved to be reduced, as may compense the fruits, or a part of the Stock, and by expresse Act of Parliament, compensations are not receiveable after sentence, and therefore neither should it be lawful after sentence of Reduction, wherein this allowance might have been craved; to seek allowance by way of Action, for what was bestowed in Meliorations, or necessary expenses.

And if in time coming, any of the ſaids Dyvours, or their interpoſed partakers of their Fraud, ſhall make any voluntar payment, or Right to any Perſon, in defraud of the lawful, and more timely diligence of another Creditor, having ſerved Inhibition, or uſed Horning, Arreſtment, Compryſing, or other lawful means duely to affect the Dyvours Lands, or Goods, or Price thereof to his behove: In that caſe, the ſaid Dyvour, or interpoſed Perſon, ſhall be holden

holden to make the same forthcoming to the Creditor, having used his first lawful diligence, who shall likewise be preferred to the Creditor, who being Posterior to him in diligence, hath obtained payment by particular favour of the Debitor, or of his interposed confident, and shall have good action to recover from the said Creditor, that which was voluntarly payed, in defraud of the Pursuers diligence.

ALbeit by the first part of the Act, all Dispositions be allowed, if made for onerous Causes, to conjunct or confident Persons, yet that only holds where Creditors have done no lawful diligence: But where Creditors have done lawful diligence against the Bankrupt, by Inhibition, Arrestment, Horning, Compryfing, or otherwayes in that case, the Bankrupt against whom the diligence is used, cannot make any voluntar Right of his Estate, to prefer thereby any Creditor he pleases, to the Creditor who has used diligence, and that though the Creditor who has got the Disposition, was likewise a lawful Creditor: but in that case the Creditor who is preferred, is declared by the Act to be lyable to make forth-coming the price of what was disponed to him.

By the principles of reason, he seems not to act fraudulently, who gets payment of what is due to him. But yet by the Civil Law, *postquam Creditores a Magistratu in possessionem bonorum missi erant*, their Debitors could not even pay any true Con-

Con-creditor, and ſo prefer one Crditor to another, ſuitaly to which, our Law has not allowed here the prefering one Creditor to another, after diligence done by Horning, Inhibition, *&c.* Which diligence we have equalled to the *miſſio in poſſeſſionem* by the *Roman Magiſtrate*: And in effect there can be no diligence done in *Scotland*, without the authority of the *Magiſtrate*; for no Inhibition, Horning, *&c.* can be raiſed without a warrand from the *Magiſtrate*. And as it was reaſonable that a Creditor *qui ſibi vigilavit*, by getting payment, ſhould not be prejudged; ſo it was as reaſonable, that payment made to him in prejudice of another Creditor, *qui ſibi vigilavit*, by doing diligence ſhould not be ſuſtained. And thus we may reconcile this part of the Statute with *l. 6. ſ. 6. h. t.* which ſayes that *qui ſuum recipit nullam videtur fraudem facere*, with which agrees *l. 5. ſ. 2. Baſil. h. t.* ὁ χρεως λαβων ου περιγραφει.

From this part of the Act, it is firſt obſerveable, that though voluntarly Rights are reduceable, at the inſtance of prior Creditors, who have done diligence; yet

yet necessary Rights are not, and therefore, if the Bankrupt was oblieged by a Minute to sell his Land, before he was put to the Horn, if for implement of that Minute, he should thereafter dispone his Lands, that Disposition may seem not Reduceable, at the instance of a Creditor who had used diligence, by Horning, or otherwayes after the Minute, though before the Disposition: because it may be alledged, that in this case, the Creditor cannot be said to have been voluntarly preferred by partial favour, as the Act bears, For that cannot be called voluntar, to which the Disponer might have been compelled. And in this case, as well as in Reductions, *ex capite Inhibitionis*, these Dispositions which depend upon necessary Causes, are drawn back, *ad suam causam*. But the doubt may be greater, if the cause upon which the Disposition depended, had no specifick obligation in it, to grant the deed quarrelled, but only a general obligation, *v. g.* If *Titius* should only be oblieged by a Minute, to Dispone Lands to *Mevius*; if *Titius* thereafter being put to the Horn, at the instance of

Sempronius, ſhould after he was put to the Horn Diſpone Lands to *Mevius*; it may be doubted whether that Diſpoſition would be Reduceable, ſince the Minute did not bear an expreſs obligation to Diſpone the ſpecifick Lands afterwards Diſponed, but only to Diſpone Lands in general: for it may be alledged, that *quo ad* theſe Lands, the Right was voluntar, ſeeing there was no ſpecifick obligation, *quo ad* theſe. And if ſuch a Diſpoſition as this might be ſuſtained, all Diſpoſitions, though made for onerous cauſes, might be ſuſtained,

Notwithſtanding of all which, I conceive, that by voluntar Rights and payments in this Paragraph, are underſtood all ſuch Rights and Payments, as are made without any previous diligence, though the Debitor could have been compelled to make them; and though there be a preceeding cauſe, whereupon the Debitor might have been forced, to make the ſaids Rights and Payments, and ſo are neceſſar, *quo ad* the Debitor, if other Creditors had not been concerned; yet they are accounted voluntar, as to this

Act and Statute, becauſe the Debitor having other Creditors, who might have compelled him as much as the Creditor whom he has ſatisfied: Yet he voluntarly prefers and gratifies him in prejudice of their diligence. And even in the caſe here inſtanced, of a Minute bearing an obligation to diſpone Land, if the Dyvour ſhould after the diligence of other Creditors Diſpone, that Diſpoſition would be conſtrued a voluntar Right, which the Bankrupt ought not to have granted in prejudice of his other Creditors, who had done diligence, and who might have affected the ſame Land, if the Diſpoſition had not been made; notwithſtanding of the perſonal obligation contained in the Minute. And it cannot be deny'd, that there is a great difference betwixt a Debitor inhibited only, and a Debitor Bankrupt: for a Debitor who is inhibited, Diſponing what he was bound to, by an obligation prior to the Inhibition, do's not contraveen the command of the Inhibition, which only forbids him to do any new deed, to the prejudice of the Inhibitor. But a Bankrupt not being able to

ſatisfie

ſatifie all his Creditors, does contraveen this Law, in gratifying one, to the prejudice of others, and to the prejudice of diligences done by them. Eſpecially ſince he could not have been compelled in Law, to prefer the Creditor who had done no dilligence.

It may be obſerved, that though voluntar Diſpoſitions be only quarrelable by this part of the Act, at the inſtance of Creditors who have done diligence; yet, Diſpoſitions made by notorious Bankrupts, are even quarrelable at the inſtance of Creditors who have done no dilligences. But in this caſe, the Diſpoſition ſo made, is not abſolutely reduceable, but is only reduceable to the effect the Creditors may have acceſſe to the Eſtate, not to affect it ſimply, for the whole ſumme, but to put them in the ſame caſe, as if the Diſpoſition had been granted to them all, for payment of their ſummes, conform to their dilligences: and the ordinary qualifications *quo ad* this part of the Act, are, either that he was in *meditatione fugæ*, or that he was in the *Abbay*, or in Priſon, or that there were very many Hornings,

and

and dilligences against him: And therefore on the 18. *December* 1672. The Lords sustained Action upon this Act against the Laird of *Kinfawns*, at the instance of *Tarsappies* Creditors, though the Disposition made to *Kinfawns*, was made for the payment of the lawful Creditors; and that because *Tarsappy* the time of the Disposition, was fugitive in the *Abbay*, and that his Debt did exceed his Estate, and that it was a Disposition *omnium bonorum*, made to an Uncle, though the Creditor here had done no diligence.

Though this Clause bear generally, *that Dispositions made in prejudice of such as have done lawful diligences, by Inhibition, Herning, Arrestment, or Comprising, shall be quarrelable*: Yet it may be justly doubted, whether these words must be so interpret, as that any of these dilligences shall be a sufficient ground, promiscuously to quarrel any Disposition: So that the Law considers not so much the nature of the dilligence done, as the Partial favour, and gratification of the Dyvour, or confident who has done no diligence, and the preferring him to one who has done diligence, though

though that diligence was not *per se* proper to affect. For if it had affected properly, there had been no neceſſity for this Act, or Statute, *v. g.* If the Creditor had inhibited, the Debitor could not have thereafter diſponed in preſudice of that Diſpoſition, but the Diſpoſition would have been reduceable *ex capite Inhibitionis*. But if the Creditor not knowing that the common Debitor had Money lying by him, that could be affected with Arreſtment, did ommit to Arreſt, but did inhibite, it appears, that if the Debitor ſhould, to gratifie and prefer a Creditor, who has no diligence, give him that Money, this Law and Statute intended, that the Creditor who has done diligence by Inhibition, ſhould not only have liberty to reduce all Diſpoſitions *ex capite Inhibitionis*: For that was competent before this Law, but that he ſhould have *condictionem ex hac lege*, to recover that Money, though the Inhibition be no proper way to affect it. And yet upon the other hand, it would ſeem abſurd, that the uſing of an Arreſtment ſhould be a ſufficient ground for the uſer to quarrel a

Right

Right made of Lands, for that were *vitiosa transitio, de genere, in genus.* But as in all general Clauses, so in this, the application must be, *singula singulis*: and therefore if after a Creditor has used any real diligence that may affect Land, such as Inhibition, or Comprising, his Bankrupt Debitor, shall to disappoint that diligence, dispone his Lands to a Concreditor, who has done no diligence; then the Inhibiter or Appryser, may quarrel that Disposition; or if a Creditor has affected any of his Debitors summes, by Horning, or Arrestment, and it to disappoint that diligence, the Bankrupt Debitor should dispone upon his Moveables in favours of a Con-creditor, *eo casu*, that Disposition to the Moveables might be quarrelled by him who has used Horning, or Arestment: which are diligences proper to affect Moveables in our Law. Which may be further urged, by these reasons, 1. Because Inhibitions and Comprisings are not proper diligences to affect Moveables, no more then Arestment or Horning can affect heretage: and the Law never priviledges a diligence,

except

except where the diligence could affect. 2. The reason why the Law Priviledges such Creditors as have used these diligences, is, because the Law presumes they might have affected the Bankrupts Estate by these diligences, and because it presumes that the Debitor dispon'd his Estate, to disappoint that diligence. But so it is, that neither could Inhibitions affect Moveables, nor can Arrestments affect heretage; nor were these Dispositions made to disappoint such diligences, and therefore, *&c.* 3. When men are to buy Land, thy look only the Registers for Inhibitions, or Comprisings, but they never consider whether there be any Arestments used against the Seller. 4. Though this part of the Act be conceived in favours of Creditors, who have used Inhibition, Horning, Arrestment, Comprising, or other lawful diligence; yet this Clause must be so interpret, that the meer raising of an Inhibition or Horning is not sufficient except the Inhibition or Horning be execute, as was found *February*, 1671. in the Case betwixt *Tynet*, and *Grahame* of *Creigie*. For the Act of Parliament mentions

tions serving an Inhibition, and using a Horning, and not the raising of either? But yet if the Bankrupt to disappoint his true Creditors, who have raised Letters of Inhibition, Horning, or Arrestment, should collude with his other Creditors who know the raising of these Letters, and they by express collusion, should make and receive such Dispositions, I conceive these Dispositions may be quarrelled upon this part of the Act, though the Letters were only raised; for else the Act might be absolutely disappointed, and immediatly upon the raising of the Letters, such Dispositions might be made, and the Creditor who did exact dilligence, *& omne quod in se erat*, should be prejudged by fraudulent conveyances, and by the nimious diligence of his cheating Debitor. Nor should the fraud of a Creditor, receiving such Dispositions, be of advantage to the Receiver, *nam nemo debet lucrari ex suo dolo.*

But it is more difficult to resolve, whether a meer charge of Horning, without denounciation, be a sufficient diligence to make all deeds after the charge to be quarrelable

relable upon this Act. And it may be alledged, that to charge upon the Horning, is *to use a Horning*, which is all that this Act requires. 2 The charge is properly the diligence, for thereby the Debitor is commanded under certification, that he will be denounced; whereas the denounciation is but the effect of the diligence: and the Debitor is denounced, becauſe he did not obey. Which reaſons incline me to believe, that the charge without denounciation, is a ſufficient diligence in this caſe, and for the ſame reaſon, I believe that a perſonal charge upon an Inhibition, would operate the ſame effect, though the execution were not uſed at the Mercat Croſs; becauſe that is only neceſſar to put the Liedges in *mala fide*, in order to a Reduction *ex capite Inhibitionis*.

And I conceive likewiſe, that the Inhibition being lawfully ſerved, though not regiſtrat, would be ſufficient *quoad* the effect deſigned by this part of the Act, for the Regiſtrating an Inhibition is different from the ſerving of it, and the ſerving of the Inhibition is all that this Act requires: And if the Creditor

ditor may reduce *ex capite inhibitionis*, before it be Regiſtrat, if it be once ſerved, that is to ſay, lewfully execute, much more ſhould the execution of it, without Regiſtration, be ſufficient as to this Act.

It may be likewiſe obſerved, that though this part of the Act, muſt be ſo interpret, as that proper and peculiar dilligences may only affect; that is to ſay, Arreſtment Moveables, and Compryſing Heritage: yet even in that caſe, Horning may be accounted a ſufficient dilligence, after the uſing whereof, the Debitor being a Dyvour, can neither Diſpone Heritage, nor Moveables, to the prejudice of the Creditor, who uſed the Horning: for a Horning is not only a dilligence that may affect Moveables, but it is likewiſe a ſtep in dilligence, neceſſary previous in many caſes to Compryſings, which are real dilligences.

By theſe words *any other mean*, is to be underſtood other Lawful dilligences, beſide Inhibitions, Hornings, Arreſtments, Compriſings, here expreſt. As for inſtance, if a Creditor ſhould raiſe a Precept

cept of Poynding, and ſhould charge his Debitor thereupon, to diſappoint which, the Debitor ſhould Diſpon his moveables to another Creditor, the raiſer of the Precept might quarrel that Diſpoſition upon this clauſe of the Act. 5. It is obſervable, that though in the firſt part of the Act, after the Law has declared all deeds done by Bankrupts, in favours of their Creditors, without an onerous cauſe, to be null; yet it ſubjoyns immediatly in another clauſe, that if a third party ſhall *bona fide* acquire a right to theſe fraudulent rights, theſe rights ſhall not be quarrellable in their perſon, except they were likewiſe partakers of the fraud. But here where the Law, in this clauſe, declares, that where diligence is done by a Creditor, the Debitor cannot thereafter in his prejudice, preferr another who is a Con-creditor, and Diſpone the Land to him, though even for an onerous Cauſe. Yet the Law has not determined, whether if this Diſpoſition made to a Con-creditor, ſhall be quarrellable in the Perſon of one, who *bona fide* has acquired that Diſpoſition from

the Con-creditor, in the ſame manner as if it would have been quarrelable in the Perſon of the Con-creditor himſelf. And though it may be alledged, that the clauſe ſubjoyned to the firſt part of the Act, in favours of third parties, ought to be repeated here, for ſingular Succeſſors in this caſe, not being partakers of the Fraud, ought not to be prejudged: yet if we conſider the caſe ſomewhat inwardly, we will find that a Diſpoſition made by the Bankrupt to a Con-creditor, and by the Con-creditor to a third Party, is quarrellable in the third Parties Perſon. For the Con-creditor could make no better Right nor he had himſelf; and there being *jus quæſitum* to the Creditor by the dilligence, ſo that he might have quarrelled the Right made to one of the Con-creditors, by the common Debitor. This Right could not be evacuated by any Diſpoſition, that the Con-creditor could make, and if it were otherwiſe, the Creditors diligence might be eaſily eluded, and diſappointed: for the Con-creditor finding that the Right made to him was quarrelable, he might ſtill tranſfer his Right to a third party, and there

was great reaſon why the Clauſe conceived in favours of third parties in the firſt part of the Act, annulls only deeds, becauſe made fraudulently; and therefore this nullity ought not to have been extended againſt third parties, who were not *participes fraudis*, for there *deficiebat ratio legis*: But this Clauſe of the Act annuls not theſe deeds upon any perſonal account, but becauſe theſe deeds are contrary to diligences done by a lawful Creditor. And therefore the nullity here ought to be extended *quo-ad* all, becauſe to whomſoever ſuch Diſpoſitions were transfered, they remain ſtill to be deeds done in prejudice of diligences done by a lawful Creditor. And ſo the ground of the nullity here being real, it ought to be extended to all. But if after the Right is ſetled in the perſon of the confident, diligence be done againſt the Dyvour, which the purchaſer from the confident, neither doth, nor is obliedged to know: he is in *bona fide* to acquire, and his Right cannot be queſtioned upon pretence of diligences, as being real, *& quæ afficiunt fundum*, in reſpect the diligence is not againſt the per-

ſon, who ſtands in the Right, but againſt the Author who was denuded.

Though the former concluſion holds in Diſpoſions of Lands, yet it may be doubted, whether it ſhould likewiſe hold in Moveables, and it ſeems very prejudicial to, and deſtructive of all Commerce, that a third party buying *bona fide* Moveables, ſhould be quarrelled for them: becauſe though they paſt throw many hands, and were bought (it may be) in a publick Mercat; yet they were originally Diſpon'd by a Bankrupt, to a Con-creditor, in prejudice of another Creditors lawful diligence, and if this were allowed, no Perſon could be in *bona fide*, or in *tuto*, to Buy or to Trade.

Upon this part of the Statute, may be raiſed this other doubt, *viz.* a Creditor compriſes, and thereafter another Creditor gets a Diſpoſition for payment of his Debt, and is Inteſt. And laſt of all a third Creditor Compriſes, and is Inteſt. The firſt Creditor who had Compriſed, intents Reduction of the Diſpoſition made to the ſecond Creditor, as made after he had

had done diligence: in which Reduction the second Compriser compears, and desires to be preferred, because he is Infeft before the pursuer, though the first Compryser: and so would be preferred to him. And since *qui vincit vincentem se, vincit & me*; it follows clearly, that since the second Compryser would be preferred to the first, that thereafter he ought also to be preferred to the Creditor, who had got the Disposition, because the first Compryser would be preferred to him who had got that Disposition. It is answered, for the pursuer who is the first Compriser, that he must be preferred, and the Disposition made to the second Creditor must accress to him, because he had done diligence before his Disposition; and by this Statute, a Creditor to whom a Disposition is made in defraud of a true Creditors diligence, is oblieged to make his Right forth-coming to the Creditor who has done diligence; whereas that Disposition would be preferred to the second Comprising, though Infeftment had not followed upon that Compryfing; because no diligence was done by that Com-

pryser, when the Dispoſition was made, nor could the ſecond Compryſer be preferred; becauſe he Compryſed only all Right that was in the Perſon of the Debitor: but ſo it is, that the Debitor was denuded, by the Diſpoſition made to the Creditor or Truſty. And I think the firſt Compryſer would be preferred; for this part of the Statute, ordains not the Diſpoſition to be null, and not to prejudge the Creditors doing diligence, which if it had only done, the ſecond Compryſer would have been preferred; but it ordains the Right made to the other Creditor, in prejudice of the diligence, to be forthcoming to them who did diligence, as ſaid is. It is here alſo obſervable, that if the Creditor who got the Diſpoſition, had not been Inteſt, the ſecond Compryſer had certainly been preferred, for he had the firſt real Right: nor had the Debitor been denuded by the Diſpoſition.

As to the argument, *qui vincit vinentem me, vincit me.* It may be anſwered, that this Brocard receives many reſtrictions; amongſt which one is, that if he *qui vincit me*, uſe a priviledged way for prevailing

vailing againſt me, which is not competent againſt another, then *poteſt vincere me, & tamen non vincere vincentem me.* And in this caſe we know, that there is a ſpecial priviledge given by this Statute, to the Creditor who does diligence: and by vertue of this priviledge, the firſt Compryſer prevailes here. And this leads me to another doubt in our Law, which is very conſiderable.

There are three Creditors, whereof one has raiſed, and ſerved an Inhibition: The ſecond Compryſes for debts, and upon Bonds poſterior to the Inhibition, and is Infeft. The third Compryſes alſo for debts prior to the Inhibition, and is alſo Infeft. The Inhibiter intents a Reduction, *ex capite inhibitionis*, againſt the firſt Compryſer, and reduces his Right; and thereafter the Inhibiter Compryſes alſo, and being Infeft, he competes for the Mails and Duties with the ſecond Compryſer, and craves to be preferred to him, becauſe he has prevailed againſt the firſt Compryſer who would have been preferred to him, he being but a ſecond Com-

Compriſer, *& qui vincet vincentem*, &c. 2. The ſecond Compriſer compriſed from a perſon who was denuded, in ſwa far as the firſt Compriſer denuded the Debitor by his compriſing, whereupon Intetment followed. But on the other hand, it may be urged for the ſecond Compriſer, that the Inhibiter prevailed only againſt the firſt Compriſer by vertue of his Inhibition, which did ſweep away the poſterior Debts, whereupon that firſt compriſing was founded. But as to his Debts, whereupon he led the ſecond compriſing, they were Debts contracted prior to the Inhibition, and ſo were not liable to a Reduction *ex eo capite*. And as his Debts could not be quarrelled by this Compriſer, ſo his real Right was alſo preferable to his, he having a prior Compriſing, whereupon Intetment followed.

As no Bankrupt can prejudge his Creditors, who have done diligence, by prefering one of them to another: ſo neither can he make a Diſpoſition to any confident perſon, with power to him to pay the Debt due to himſelf in the firſt place, and his Creditors in the next place,

two

two instances whereof I remember lately decided. The first was, the 8. of *January* 1669. the case whereof was this, The Laird of *Craigmiller* being Debitor to Mr. *John Prestoun* his Brother, did dispon him his Estate for payment of his Debts particularly therein related, with power to the said Mr. *John* to pay any of the Creditors he pleased. And Mr. *John* being Infeft upon that Disposition, there was a competition for the Mails and Duties, betwixt Mr. *John*, and Captain *Newman*, who was one of the Creditors contained in the Disposition: In which Competition, Captain *Newman* craved to be preferred, notwithstanding of that Disposition granted to Mr. *John*, because the Disposition granted to Mr. *John*, was granted to the behove of the said Captain his Debt, being one of the onerous Causes therein expresst. To which Mr. *John* answered, that he had power by the same Disposition to prefer any of the Creditors he pleased, and that the value of the Land was now exhausted by payment made to other Creditors: To which it was duplyed by *Newman*, that this Disposition

position was fraudulent, and reduceable upon the Act of Parliament 1621, for as *Craigmiller* himself could not prefer any to the prejudice of him who had done diligence, so neither could he bestow that faculty upon any other. To which it was answered, that *Craigmiller* might have disponed his Estate to any person he pleased, for an onerous Cause, before Captain *Newman* did diligence. But so it is, that at the time of this Disposition, *Newman* had done no diligence. 2. This Disposition at least ought to be sustained, in so far as *Craigmiller* was Debitor to Mr. *John*, either for Debt due to himself, or for relief of Cautionry. To which answers, it was replyed, that *quo ad* the first, it was not relevant, because though the Disposition was prior to the diligence done by *Newman*: yet the said *Newman* had done diligence, before payment made to any others of the Creditors, and consequently before the preferrence. Whereas by the forsaid Act, no Creditor could be preferred after diligence. And to the second Branch of the answer, it was replyed, that though *Craigmiller* could have dis-

disponed his Estate to Mr. *John*, for his payment, or relief, expressly before *Newmans* diligence; yet that was not done in this case: for this Disposition was only made in general termes, for payment of *Craigmillers* Debts generally, and Mr. *John* had no advantage over others thereby, but in swa far as he had by preferring himself by vertue of the forsaid Clause, which was unwarrantable. And so the Disponers deed *quo ad* him, was null; Because *quod facere potuit non fecit, & quod fecit, facere non potuit.* Upon which debate the Lords preferred Mr. *John* only in swa far as concerned his own Debt, or Cautionry: but sustained not the preferrance, in swa far as concerned other Creditors.

The other Decision was the 24. *July*, 1669. in which *Young* craved a Disposition made to *Anderson*, by *Fleming*, to be reduced, as done in his prejudice, he being a Creditor who had inhibit, and Compriséd. It was answered by *Anderson*, that he had granted a Back-band, declaring that the Disposition was in Trust, for payment of the Debt due to *Anderson* himself. And in the next place, for payment

ment of *Flemings* Creditors: and ſubſumed, that he had payed as many Creditors as would exhauſt the price, which he was in *bona fide* to do, there being no diligence againſt him; nor could he be prejudged by any diligence againſt *Fleming*, *Fleming* being denuded, as ſaid is.

To which anſwer it was replyed, that *Anderſon* being but a Truſtee, was *fictioni juris*, in the ſame condition with *Fleming*; And as *Flemnig* could not diſappoint him, as a lawful Creditor; ſo neither could *Anderſon* his Truſtee: And if it were otherwiſe, the diligences of lawful Creditors might be rendred eluſory, for the Debitor who reſolved to diſappoint the diligences of his Creditors, might ſtill diſpon his Eſtate to a Truſtee; which Truſtee, and Truſt, the Debitors not knowing, they could not know againſt whom diligence was to be done. Likeas, in Law, this power to prefer Creditors, behoved to be interpret *legittimo modo, & interminis habilibus*: ſo that the Creditors could not be diſappointed, but that they ſhould be preferred according to their

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diligences, as they behoved to have been by the Debitor himself. In respect of which reply, the Lords preferred the Creditors, and found that voluntar payment made by the Trustee, could not prejudge the Creditors who had done lawful diligences, by voluntar payment. But the question here remains, whether if any of the Creditors had Arrested in *Andersons* hand, as Trustee, and had pursued an Action to make forth-comming against him: If in that case, *Anderson* was obliged to give in a qualified Oath, bearing that he was Trustee, but that there was other Creditors who had done more timeous diligence, or if he ought to have called the Creditors, who had done more timeous diligence, as said is.

This Act is only conceived in favours of such as were Creditors, to those who granted such Dispositions, prior to the deeds contraverted. But *argumento hujus legis*, and upon the same reason of equity, the Lords constantly sustain Declarators at the instance of Creditors of the Father concluding any Right, made even by strangers, to Children *in familia*, to

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be null, as being granted to their prejudice, without an onerous Cauſe, or as being acquired by the parents means. Which preſumptions are never otherwiſe elyded, then by alledging, that the procurer had an Eſtate *aliunde*, whereby he might have procured the Right contraverted. As for inſtance, *Sempronius* being Debitor to *Mevius*, diſpones not his Eſtate to his Son, but acquires an Eſtate in his Sons name from a ſtranger, this Diſpoſition ſo acquired, can never be quarrelled by *Mevius*, the Fathers Creditor, by way of Reduction. For the effect of a Reduction is nothing elſe but the annulling of the deed, and the taking it out of the way, or the bringing back of the Eſtate diſpon'd, to the ſame condition it was in before, which would not be ſufficient in this caſe, becauſe the Eſtate which the Creditor deſires to affect, was never in the Debitors perſon. And therefore it is neceſſary for the Creditor to raiſe a Declarator, wherein he muſt narate, that *Sempronius* being Debitor to him, did fraudulently acquire the Right of ſuch and ſuch Lands, in his ſons name; and which muſt

be

be presumed to be acquired by the Fathers Estate: because they were acquired by a Son *in familia*, who is presumed to have no Estate, but what he derives from his Father, or else he must Lybel, that though the Disposition be procured by a Major, who is *foris-familiat*, and Trafficking upon his own account, the same was truly acquired by the Debitors means, and the Disposition only acquired to be a colourable Title to disappoint his Debt. Therefore concludes, that the said Estate so bought, may be declared lyable to his Debt, in the same manner, as if the Disposition had been taken in his Debitors name.

The Common Law, and ours, does not only reprobate Dispositions, made by Debitors: *in meditatione fugæ*, but both the one, and the other of these Laws, do likewise allow the summar apprehending of Creditors, who are suspected to be Bankrupts. And by our Law, though a man cannot be regularly Imprisoned for Debt, without Letters of Caption be formerly raised, Yet in *Masons* case, the 5. *November* 1665. The Lords summarly, upon a Bill, issued out a warrand to apprehend

prehend him, *tanquam Debitorem ſuſpectum, & fugitivum.* And though at firſt they doubted, whether their own power could extend this far, yet thereafter they found that it might: ſince even the Admiral grants ſuch warrants, and yet there may be ſome ſpeciality *quoad* the Admiral ſince the nature of his Juriſdiction allowes a very ſumar procedor: and ſince this his Juriſdiction is ordinarly exerciſed over Perſons, who have an eaſie way to convey themſelves out of the Countrey, and are ordinarly very little fixed to one place.

But becauſe this may open a door to great Arbitrarineſs, and may afford great occaſion of prejudging the Leidges, ſince upon this pretext, Merchants may, whilſt they are going about great bargains, and others about urgent, and neceſſary affairs, be laid up in Priſon upon this account. It will be fit to conſider, what the common Law, and Lawyers have delivered as their opinion in this Point.

Lawyers diſtinguiſh *inter fugitivum, & ſuſpectum de fuga*, the one is guilty only

ly of an Intention, but the other has actually fled. And I conceive, that *meditatio fugæ*, so much considered by our Law, is a midst betwixt those two, for he who is *in meditatione fugæ*, has *cum suspectio* designed a flight, and has *cum fugitivo*, done some extrinsick deed in order to his flight.

He who is suspect, or fugitive, may be apprehended by the common Law, summarly by any Judge, who can cite that Person before him, *qui potest recitare, id est personali coercitione coercere Debitores*, they may be also apprehended by a Judge otherways incompetent: and he that is taken by an incompetent Judge, cannot object the incompetency. For as Lawyers observe, these Debitors who are Fugitive, or suspect of flying, may be apprehended by warrands, direct either by incompetent Judges, or by warrands direct in incompetent times, such as are vacand times, or holy dayes, *glos. in l. si super C. de feriis. verb. fideijussionis.* But with us, no Inferiour, much less can incompetent Judges, can give such

warrands. And it has been expresly decided, that an Arrestment laid on, even upon a Bankrupts Goods, by an incompetent Judge, was not valid, 5 *December* 1671. where the Arrestment was laid on in *Paslay*, by vertue of an Decreet obtained before the Bailie of *Cunninghame*, and so was found null, as *extra districtum*. Albeit the Bailie of *Cunninghame*, was also Sheriff of *Renfrew*, within which Sheriffdome *Paslay* lyes. —— Lawyers are likewise of opinion, that the Creditor may apprehend one who is Debitor, if he find him actually fleeing: for fleeing in this case, is a kind of cryme. But if the flyer be not a Debitor by expreis Contract, he cannot be apprehended by the Creditor without a warrand, except either a Judge cannot be had, or that he be fleeing with the Debitors Money, *Ang. in l. extat. ff. quod met. caus.*

He who craves a warrand, to take a Debitor who is suspect, or fugitive, must lybel to the Judge, reasons why he suspects his fleeing, as that he was packing up

up his Goods, or was lurking, or denyed himself when his Creditors were seeking him. And though by opinion of the Doctors, none who has an immoveable, or Land Estate, can be thus proceeded againſt, becauſe it is preſumed, he will have ſo great care for his Eſtate, as not to leave it: and becauſe his Land Eſtate is alwayes a biding cautioner: yet if either the Land Eſtate be very ſmall, or if it be affected with diligences that may exhauſt it. I think that in theſe caſes, ſuch Heretors can have no priviledge, nor are thir ſummar warrands ever allowed to ſuch as become voluntarly Creditors, after the Debitor was ſuſpected; for theſe ought to blame themſelves, who truſted a Perſon in that condition: but it is otherwiſe if they became Creditors *ex delicto*, *vel quaſi delicto*: as for inſtance, if after he was ſuſpected, he Robe, or Wound, or commit any Ryot. For in that caſe, he who becomes ſo, his Creditor may have ſuch a warrand for apprehending him; and theſe warrands are granted, not only for pure and liquid Debts: but even for

conditional Debts, and for Debts whereof the termes of payment are not yet come; and though the Debts be small, except they be very inconsiderable, *Cacia-lup. tract. de debit. susp. quest.* 3.

Finally, the Lords declares, all such Bankrupts, and Dyvours, and all Interposed Persons, for covering, or executing their Frauds; and all others, who shall give Council, and wilful assistance unto the said Bankrupts, in the devising, and practising of their saids Frauds, and

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godleſs deceits, to the prejudice of their true Creditors, ſhall be reputed, and holden diſhoneſt, falſe, and infamous Perſons, incapable of all Honours, Dignities, Benefices, and Offices; or to paſs upon Inqueſts, or Aſſiſes, or to bear witneſs in Judgement, or out-with in any time coming.

FOr the better underſtanding of this part of the Act, concerning the puniſhment of Bankrupts, and of ſuch as adviſe, or aſſiſt them. It is fit to obſerve with the *Civilians*, that

Bankrupts, and Dyvours, are either such as are become insolvendo by their Misfortune, rather then Fault. And *quo ad* these, because they were guilty of no Crime, therefore no Corporal Punishment was appointed for them by the Law, *omni corporali cruciatu remoto* saith *l fin. Cod. qui. bon. ced. poss.* Nor does Infamy follow them, *Novella*; and therefore this clause of the Act, cannot be interpret of such Bankrupts: and though the clause be general, without distinguishing Bankrupts: and that it might be therefore alledged, that *ubi lex non distinguit, nec nos.* Yet general Lawes must receive their restrictive Interpretations from the Common Law: And since the design of this Act, was (as is very clear by the Narrative) to prevent, and punish Frauds and Cheats; it is just, that these general clauses should not be extended beyond the expres scope, and designe of the Act.

The second kind of Bankrupts mentioned in the Law, are these; who only by their

their own fault become Bankrupts: *qui suo vitio fortunas conturbarunt.* And the third kind of Bankrupts, were such, as became Bankrupts, partly by their own, and partly by the fault of fortune. And both these last kinds of Bankrupts were denyed the benefit of a *cessio bonorum, nam hoc est miserorum subsidium, sed non presidium, doloso ruml. fin. h. t. & l. pen. ff. de jur. Dot.* And with us, the Bankrups of both these Classes are denyed the benefit of a *cessio bonorum*, except they wear the Habit: though such are spared from it; whom fortune without their own fault, has thrown into the necessity of seeking that miserable remeed. Nor does the granting of Dispositions that are reduceable upon this Act still infer infamy, for if a man grant a Disposition, whereby one Creditor is preferred to another who has done diligence, that Disposition would be reduceable, and yet if there remained as much as might have payed all the Creditors, that Disposition could not infer infamy. And by this Act, such only are declared infamous, as are guilty of fraud, and Godlesse devices.

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Such as give council are lyable to the pains of this Act, which is likewise conform to the opinion of the *Civilians*, *vid. Strach. de decotor*: But they distinguish betwixt such as gave council, or advice to those who were resolved before to cheat their Creditors; and some Doctors do conclude, that such advisers, are not punishable, because the Bankrupt followed not here the advice of another, but his own inclination. And this opinion was first founded upon the *Gl. ff. inst. de oblig. que ex delict. §. ope*, but others do more reasonably conclude, with *Dynus ad reg. nullus de reg. jur. l. 166.* That the advice is equally punishable, whether the Bankrupt was resolved to follow that advice, or his own inclination: Because the adviser did here all that in him was, to transgresse the Law, others distinguish thus, either (say they) the principal offender designed only to have cheated a Bankrupt, but delayed till he got advice, and then the adviser is equally punishable with the principal, because there, the transgression was imputeable chiefly to the

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Adviſer: Or elſe the principal Adviſer had begun to defraud and cheat his Creditors, and the advice did but interveen, and was but ſupervenient: And then the Adviſer is not equally puniſhable, eſpecially where the contrivance is not otherwiſe probable, then by meer preſumptions.

Wilfull aſſiſtance alſo in deviſing or practiſing theſe frauds, is alſo puniſhable by this Act, under which Lawyers comprehend ſuch as tranſact betwixt the Bankrupts and interpoſed perſons, ſuch as lend him Horſes to flee, if they knew his deſign, and ſuch as carry the Goods of the Bankrupt, or ſuch as reſcue him when he is apprehended, or ſtop his being apprehended, *Strach. de decoct. part.* 2.

The puniſhment appointed by this Act, is, that *they ſhall be repute falſe perſons*: By which is not meant, that they ſhall be puniſhed *tanquam falſarii*, but as cheats for cheating is a ſpecies of falſehood. And yet if a Bankrupt did call himſelf by the name of a Rich Merchant, there-

thereby to get Credit: or if any treated for him under that name, I conceive they might be purſued *tanqnam falſarii*, and and might be puniſht accordingly.

They are alſo declared uncapable of all Honours, or Dignities, and Offices, which are not diſtinct puniſhments from infamy, but are the natural conſequences of it. For whoſoever is declared infamous, is *eo ipſo* uncapable of all Honours, Dignities, and Offices.

They are alſo declared uncapable to paſs upon Inqueſts, or Aſſyſes. But this was alſo unneceſſary, for Aſſyſers have a mixt imployment, and without being either Judges, or Witneſſes, are both, and as to their capacity of Judges, they fell under the foregoing Clauſe, whereby all Bankrupts and their aſſiſtants are declared uncapable to be Judges. And as to their capacity of being Witneſſes, they fell under the ſubſequent Clauſe, whereby ſuch are likewiſe debared from being Witneſſes. And I believe the reaſon why they were ſpecially debared by this Act, was becauſe our Law looks

looks upon Aſſyſers, as having an imployment diſtinct, and differing from either a Judge, or a Witneſs, and *medium participationis*, betwixt the two. Though *regulariter*, in our Law, whatever debars on from being a Witneſs, debars him likewiſe from being an Aſſyſer. And there is no ſurer legal topick with us, then an Argument drawn from a Witneſs, to an Aſſyſer: And yet *argumento hujus legis*, an Aſſyſer may be concluded different from both Judge, and Witneſſe, and *medium participationis*, betwixt them.

Bankrupts, and their aſſiſters are likewiſe by this Act, declared uncapable to be Witneſſes, and the reaſon of this excluſion certainly is, becauſe the Law conſiders ſuch as have cheated Creditors, as perſons who would be ready to cheat Judges; that ſuch as have been diſhoneſt in their own Affairs, will never be honeſt in the Affairs of other men.

And whereas this Clauſe, debars them from being Witneſſes, *in-with, or out-with Judgement*, by Witneſſes out-with Judgement,

ment, are meant Witneſſes in Writs, as Bonds, Seaſings, *&c.* But yet it may be doubted, whether in Bonds, or ſuch like Writs, this can take place: For there, the Witneſſes are preſumed of Law to be admitted of conſent, which excludes all objections againſt Witneſſes; and therefore a mans ſervant, or brother, cannot be received judicially as Witneſſes for him; yet they may be, and are ſuſtained as Witneſſes in Bonds granted to him. Nor did I ever hear, a Bond, Seaſing, or any other Writ, reduced upon this head, *viz.* That it had only two Witneſſes, one whereof was uncapable to be a Witneſſe, becauſe he was found by the Lords Decreet to have either granted fraudulent Diſpoſitions, or to have been in acceſſion thereto, except he was declared expreſly infamous by the Lords ſentence, as *Maſon* was. Though ſuch an objection ſeems well founded upon this Clauſe of the Act.

Not only ſuch as defraud Creditors, are declared infamous by this Act, but even in Declarators founded upon the Common Law,

Law, the persons guilty will be declared infamous; as was found in *Masons* case: And though it was alledged, that infamy could not be inferred without an expresse Law; yet it was found that this Act impowered the Lords, to decide conform to the Common Law in like cases, *& à paritate rationis*, and he was thereupon declared infamous.

I have reserved to be debated in this last place, whether by vertue of the last Clause of this Act, whereby the advysers of frauds are to be punished: An Advocat may be examined upon his having given advice to his Client, to defraud his Creditors: or whether he may be examined against his Client, who in consulting with him, and taking his advice, has made him as his Advocat, privie to the fraud he has committed. And because these questions are of universal consequence, I am resolved to consider them in general termes, both with, and without relation to this Act. For if Advocats may be forced to depon against themselves, or their Clients in this point, or

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as to any other thing which is the ſubject-matter of their conſultations, they may be as well forced in all things; for the parity of reaſon, and the publick intereſt being the ſame. I ſee not why if the Judge may lawfully force them in the one, he may not as well obliedge them in all other caſes.

As to the firſt queſtion, it would appear, that an Advocat cannot be obliedged to depon upon any thing which may bind a guilt upon himſelf, or which may defame him.

As to the next queſtion, it would appear, that it is the intereſt of the Common-Wealth, to have the truth of all frauds and contrivances detected; and that he who conceals the truth, is as guilty as he who commits a falſhood: But to ſuch as attentively and judiciouſly conſider, they may probably find themſelves enclined to the contrary opinion, by theſe conſiderations, 1. An Advocat, is by the nature of his imployment tyed to the ſame faithfulneſs that any Depoſitor is: For his Client has depoſitat in his

his breaſt, his greateſt ſecrets; and it is the intereſt of the Common-wealth, to have that freedom allowed, and ſecured, without which, men cannot mannage their affairs; and privat buſineſs: and who would uſe that freedom, if they might be enſnared by it? This were to beget a diffidence betwixt ſuch, who ſhould of all others, have the greateſt mutual confidence in one another; and this will make ignorant men ſo jealous of their Advocats, that they will loſe their privat buſineſs, or ſuccumb in their juſt defence, rather then hazard the opening of their ſecrets to thoſe who can give them no advice, when the caſe is half conceal'd, or may be forced to diſcover them, when revealed. As for inſtance, a Client not knowing that he can be defended againſt an purſuit for murder, by proving it was committed in ſelf-defence, will conceal from his Advocat, that he killed at all, leaſt his confeſſion, and his Advocats teſtimony, might be made uſe of againſt him. 2. This might afford to Advocats

cats great matter of prevarication, and might occasion much prejudice to the Clients, for an Advocat having discovered the weakness of his Clients Cause, might discover it likewise to his adversary: and to cover his prevarication, he might suggest to his said adversary, that he might be examined, and so impute the discovering of these secrets, to the cogency of the Law, and not to his own privat inclinations, which made *Rob. Anneus* say, that *si tamen de inceps, Advocato liceat, Clientium secreta pandere, & causarum arcana fidei suæ commissa, palam & publice proferre eaque parum fido pectore effutire. In foro deinceps, non æquitatis cognitio, sed latrocinium exercebitur: tribunalia nurices erunt, quibus litigantium simplicitatem undiq; circumvenire, & imputare licebit, & in judicio, non templum themidis, sed spoliarium erit, si clientes tacita confessionis fide captare, & irretire permittetur.* Whereas now, if a Clients secret be discovered, he can blame no man but his own Advocats, who

who are by their honour and interest, oblieged to keep up a secret, whose discovery can be ascribed to none, but them. The designe of all Probation is to convince the Judge, whereas because of the great Relation that is betwixt an Advocat, and his Client, Law and Experience cannot but presume, that hardly Truth can be discovered this way. And this way rather opens a door to lying, or gives occasion to fallacious, and ambiguous concealing of Truth, then helps the discovery of it. Upon which account, the Law has shunned to force men to depon against themselves, or Husbands against their Wives, or Children against their Parents in Criminal cases. And therefore *Virgil* equals those two, *pulsatus've parens, & fraus innexa clienti.* Upon which place, *Servius* observes that Clientes, *quasi colentes, Patroni, quasi patres, tantundem ergo est Clientem, quantum filium fallere*: and such was the respect due to Clients, that the Law allowed less liberty in deponing against them, then

againſt Blood Relations: and thus M. *Cato* is brought in, by *A. Gell.* ſaying, *adverſus cognatos pro cliente teſtatur, teſtimonium adverſus clientem nemo dicit.* And the Law has ſtill been rather inclined to evite the hazard of Perjury, then to follow too far the Intereſt of the Common-wealth; or of private Parties, ſince God Almighty ſuffers by the one, and men only ſuffer by the other. 5. The Law *L. nimis grave C. de teſtibus*, tells us, that *Mandatis cavetur, ut præſides attendant, ne Patroni in cauſa cui Patrocinium præſtiterunt, teſtimonium dicant.* And though *Bartolus*, and ſome others do expon this Law, ſo, as if a Judge were thereby only diſcharged to admit an Advocat to depon for his Client. This Gloſs ſeems to be moſt abſurd, both becauſe the words of the Law are general, and ſince they extend to both caſes, and that no Poſterior Law has reſtricted them, there is no reaſon why both ſhould not be equally comprehended: As alſo, Laws are preſumed to be made ſtill againſt the more doubtful caſe; but

that

that Advocats could have been received to depon in favours of their Client, was ſo clearly againſt the whole Analogy of Law, that there needed no ſpecial Law to have been made againſt that caſe: but there was neceſſity to inform Judges, whether Advocats could be forced to depon againſt their Clients: which gloſs is approved by the learned *Heraldus de Rer. judicatar auctor. lib. 2. cap. 4* And conform thereto, the Parliament of *Paris* did find in *December 1619.* that an Advocat could not be oblieged to depon againſt his Client, for clearing of a Fraud, for which his Client was purſued.

By *Juſtinians* 80. *Novel*, *cap.* 8. It is appointed, that though witneſſes may be forced to depone, both in Civil, and Criminal matters: yet thoſe who had been imployed as Mediators, who are called there, μεσιται, ſhould not be forced to depone as witneſſes, except both parties conſent; for which no other reaſon can be given: but becauſe the parties had entruſted their ſecrets to them. And accordingly the Senat of *Savoy*, de-

cided the 23. *November*, 1596. as *Faber* observes, *lib. 4. tit. 15. def. 56.* and the reason there given, is, *solent enim qui litigant, agere liberius cum istis mediatoribus, quasi cum confessore; & causa patrono.* Then which nothing can be more convincing, *Idem etiam in proxeneta observavit papiensis in form. jur. test. num. 15.* And in this the Cannon Law agrees with the Civil: for by *Can. statut. Caus. 2. quest. 6.* It is ordained, that no Clergy-men shall be obliedged, or can be compelled to bear witness in a case which has been referred to him, by two Laicks. And therefore since that trust is held so Sacred, that the secrets even revealed to Arbiters, are not to be extorted from them, much less ought an Advocat, to whose *patrocinie*, his Clients flee, and from whose faithfulness they seek protection, to violat that trust, and disappoint that confidence, *sane id à Romana virtute, & animi magnitudine erat plane alienum.* And how much secresie they allowed to witnesses, who had got any thing entrusted to them, is clear,

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l. 1. §. 38. ff. depoſit. ſi quis tabulas teſtamenti apud ſe depoſitas, pluribus preſentibus legit, ait Labeo, depoſiti actione recte de tabulis agi poſſe, ego arbitror, & injuriarum agi poſſe, ſi hoc animo recitatum teſtamentum eſt, quibuſdam preſentibus, ut judicio ſecreta ejus qui teſtatus eſt divulgarentur. Nor can there be a ſolid reaſon given, why Confeſſors cannot be forced to diſcover the ſecrets revealed to them, *ſub ſigillo confeſſionis*, And yet Advocats ſhall be oblieged to reveal what is conſigned to them, under the ſacred aſſurance of Truſt, and Secrecy: Eſpecially ſeeing that Law which is alledged againſt them, does acknowlepge them to be *juris & juſtitiæ Sacerdotes l. 1. ff. de juſt. & jur.* Since the Common wealth is more concerned in the ſecrets of Affairs, then in ſecrets of Devotion; and there are greater temptations to provoke the Truſtee to diſcover the one, then the other: for few can have advantage by what a Confeſſor can reveal, but many could gain by that an Advocat can diſcover.

I muſt here beg leave to repreſent, that

the rise of this great trust betwixt Clients, and Patrons, was, that first when *Rome* was founded, *Romulus* finding the error the *Grecians* had committed, in tyranizing over their Clients, (whom the *Athenians* called θητας. and the *Thessalians* πενεστας, he did introduce a mutual Friendship and tye betwixt them. And as *Aulus Gellius* observes *lib. 5. cap. 13. in officiis apud majores, ita observatum est, primum tutelæ, deinde hospiti, deinde clienti, tum cognato, postea affini.* And as *Dionis. halic. lib. 2. Ant Rom.* observes, the Patron was obliedged, *clienti jura interpretari, & lites pro eo suscipere.* And this was common to both, that they could never accuse nor bear Witness against one another κοιναι δ' αμφοτεροις, ουτε ορκοι, ουτε θεμις, υπ κατηγορει αλληλων, εισ δικαις καταμαρτυρειν. And on the Laws of the twelve Tables was, *patronus si clienti fraudem fecerit, sacer esto.* So sacrilegious a thing was it then held, to reveal the Clients secrets: But thereafter this mutual dependence, and friendship, became so suspect to the *Roman* Emperours, that none

none were allowed to be Patrons; but Lawyers, whose power the Magistrates needed not suspect; and who were presumed to be men, so legal, and of such integrity, that they would advice nothing, but what was just. And therefore, betwixt these continued the Trust, and mutual assurance that was required betwixt the old Patrons, and their Clients. Though Advocats be now known to antequaries, for distinction, under the term of *patroni secundarii*.

Whereas it is urged, that it is the interest of the Common-wealth, that truth be discovered: To this it is answered, that it is indeed the interest of the Common-wealth to discover the truth, as far as that can be done, in a convenient and lawful way; for it is likewise the interest of the Common-wealth, not to unseal the secrets of privat persons, and thereby to render all Trust, and Commerce suspect. And notwithstanding of this Argument, the Law has exempted men from deponing against themselves, and against many others, who are enumerat,

l. 4.

l. 4. ff. de testibus and of which we have very many instances in our Law. *Rei publicæ quidem interest, crimina impunita non esse, sed rei publicæ quoque interest, pietatis & necessitudinis officia sæpe tecta conservari, sine quibus nihil sanctum haberi potest, nec inviolatum.* And *Cicero lib. 3. de offic.* does elegantly affirm, *non igitur patriæ præstabit omnibus officiis, sed ipsi patriæ conducit, pios cives habere.* Advocats are persons whose Breeding obliedges them to admire Justice, as Musicians do Musick, or as a man does that Countrey in which he lives; and they having given their Oath *de fideli*, at their admission, to give their Clients advice according to the Laws: they cannot be presumed to have advised any thing against the Law. And it is known, that they offend in this so infrequently, if at all; that it may seem fitter not to inquire into such cases, that seldom occure, then by inquiry to introduce a jealousie betwixt parties, who need such strict intimacy. And as no Gentleman is desired to divulge his friends secrets, much lesse should the Law require this from Advocats, since it has

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obliedged them to imploy Advocats: and to entruſt them with their ſecrets. And though men may be ſuſpect, when they debate for their own intereſt, and advantage, yet what intereſt can Advocats have here, ſave that of their Clients, for the Client and not the Advocat ſuffers by the diſcovery, and the Common-wealth being only a collective body of Clients; in effect the Common-wealth is prejudged, becauſe Clients are prejudged. And though a Deciſion in the Parliament of *Paris*, be commonly alledged upon this point, 18. *June* 1580. in the caſe of one *Barbine*, yet all that was there decided, was, *que l'advocat, & conſeil, pourroit eſtre ouy par forme de teſmoinage.* So that the Advocats have there been willing, but were not forced: And the parties objections were there reſerved, for the Deciſion beares. *Sauf a la partie, ſes reproches:* So that they were but examined before anſwer. Nor can an Advocat be thus ſaid to conceal truth, ſince he is only ſaid to conceal, who may be forced to depon. And if Clients know, that their Advocats

cats may be forced to depon againſt them, they will keep their ſecrets, or propoſe their doubts under borrowed names; and thus the deſign of finding out truth will be diſappointed. And the Argument altogether eluded, ſome urge, that Advocats may be forced to depon upon the having of their Clients Papers. And that by many Deciſions they have been oft forced to give them up, after full debates: wherein a ſpecial priviledge upon the account of their imployment has been pretended; from which they infer, that they may be alſo examined upon what paſt betwixt their Clients and them. But to this, the eaſie, and juſt anſwer is, that an Advocat can be no further obliedged to deliver his Clients Papers, then the Client himſelf could have been, but neither the one, nor the other could be forced to deliver up any Papers, but ſuch as the Purſuer is in Law allowed an intereſt in, and in ſo far as they are the purſuers Papers. Nor are ſuch Papers as ought to be exhibited, to be accounted ſecrets, and Advocats are obliedged here, not as Advocats, but as ordinary Subjects. But I will not decide this weighty point.

ACT

ACT XXVIII.

A Ratification of an Act of the Lords of Counsel and Session, made in July 1620. *against unlawful Dispositions and Alienations made by Dyvours and Bankrupts.*

OUR SOVERAINE LORD, with advice and consent of the ESTATES, conveened in this present Parliament, ratifies, approves, and for his Highnesse, and His Successours, perpetually confirmes the Act of the Lords of Counsel and Session, made against Dyvours and Bankrupts, at *Edinburg*, the 12. day of *July*, 1620. and ordaines the same to have, and take full effect, and execution, as a necessary and profitable Law, for the weal of all his Highnes Subjects, Of the which Act the tenor followeth.

THE LORDS Of Counsel and Session understanding by the grievous and just complaints of many of his majesties good subjects, that the fraud, malice, and falshood of a number of Divours and Bankrupts, is become so frequent, and avowed,

avowed, and hath already taken such progresse, to the over-throw of many honest mens fortunes, and estates, that it is likely to dissolve, trust, commerce and faithful dealing amongst Subjects: Whereupon must ensue the ruine of the whole Estate, if the godlesse deceites of those be not prevented, and remedied; who by their apparent Wealth in Lands and Goods, and by their show of Conscience, Credit, and Honestie; drawing into their hands upon trust the Money, Merchandize, and Goods, of well-meaning and credulous persons, do no wayes intend to repay the same: but either to live ryotously, by wasting of other mens substance; or to enrich themselves, by that subtil stealth of true mens goods, and to withdraw themselves, and their goods, forth of this Realme, to elude all execution of Justice: And to that effect, and in manifest defraud of their Creditors, do make simulate and fraudful alienations, dispositions, and other securities, of their Lands, Reversions, Teyndes, Goods, Actions, Debts, and others, belonging unto them, to their Wives, Children, Kinsmen, alleyes, and other confident and interposed per-

perſons: without any true, lawful, or neceſſary cauſe: and without any juſt or true price interveining in their ſaid bargaines: Whereby their juſt Creditors, and Cautioners, are falſly and godleſly defrauded of all payment of their juſt debts: and many honeſt Families likely to come to utter ruine.

FOR remedie whereof, the ſaid LORDS, according to the power given unto them by His Majeſtie, and His moſt Noble Progenitors, to ſet down Orders for adminiſtration of Juſtice: meaning to follow and practice the good and commendable Laws, Civil and Cannon, made againſt fraudful alienations, in prejudice of Creditors, and againſt the authors and partakers of ſuch fraud; Statutes, ordaines, and declares, That in all actions, and cauſes, depending, or to be intended by any true Creditor, for recoverie of his juſt Debt, or ſatisfaction of his lawful action and right: They will decreet, and decern, all Alienations, Diſpoſitions, Aſſignations, and tranſlations whatſoever made by the Debtor, of any of his Lands, Teyndes, Reverſions, Actions, Debts, or goods whatſoever, to any conjunct

junct or confident perſon, without true, juſt, and neceſſary cauſes, and without a juſt price really payed, the ſame being done after the contracting of lawful Debts from true Creditors: To have been from the beginning, and to be in all times comming, Null, and of none availe, force, nor effect: at the inſtance of the true and juſt Creditor, by way of action, exception, or reply: without further declarator. And in caſe any of His Majeſties good Subjects (no wayes partakers of the ſaid fraudes) have lawfully purchaſed any of the ſaid Bankrupts Lands, or goods, by true bargains, for juſt and competent prices, or in ſatisfaction of their lawful Debts, from the interpoſed perſons, truſted by the ſaid Divours. In that caſe, the right lawfully acquired by him who is no wayes partaker of the fraude, ſhall not be anulled in manner foreſaid. But the receiver of the price of the ſaid Lands, goods, and others, from the buyer, ſhall be holden and obliſhed to make the ſame forth-comming to the behove of the Bankrupts, true Creditors, in payment of their lawful Debts. And it ſhall be ſufficient probation of the fraud intended

tended againſt the Creditors, if they, or any of them, ſhall be able to verifie by write, or by oath, of the party receiver of any ſecurity from the Divour or Bankrupt, that the ſame was made without any true, juſt, and neceſſary cauſe, or without any true and competent price: Or that the Lands and goods of the Divour and Bankrupt being ſold by him who bought them from the ſaid Divour, the whole, or the moſt part of the price thereof was converted, or to be converted to the Bankrupts profit and uſe. Providing alwayes that ſo much of the ſaid lands and goods, or prices thereof ſo truſted by Bankrupts to interpoſed perſons as hath been really payed, or aſſigned by them to any of the Bankrupts lawful Creditors, ſhall be allowed unto them, they making the reſt forth-comming to the remanent Creditors, who want their due payments. And if in time comming any of the ſaid Divours, or their interpoſed partakers of their fraude, ſhall make any voluntary payment, or right to any perſon, in defraude of the Lawful, and more timely diligence of another Creditor, having ſerved Inhibition, or uſed Horning

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ing Arreſtment, Comprizing, or other lawful mean, duly to affect the Divours Lands, or price thereof to his behove. In that caſe the ſaid Divour or interpoſed perſon, ſhall be holden to make the ſame forth-comming to the Creditor, having uſed his firſt lawful dilligence: who ſhall likewiſe be preferred to the Concreditor, who being poſterior unto him in diligence, hath obtained payment by partial favour of the Debtor, or of his interpoſed confident: and ſhall have good action to recover from the ſaid Creditor that which was voluntarily payed in defraude of the purſuers diligence.

Finally, THE LORDS declares all ſuch Bankrupts and Divours, and all interpoſed perſons, for covering or executing their frauds, and all others, who ſhall give counſel, and wilful aſſiſtance unto the ſaid Bankrupts, in the deviſing and practiſing of their ſaid fraudes, and godleſs deceits, to the prejudice of their true Creditors, ſhall be reputed and holden diſhoneſt, falſe, and infamous perſons, incapable of all honours, dignities, benefices, and offices: Or to paſs upon Inqueſts, or Aſſyſes: Or to bear witneſs in Judgement, or out-with in any times coming.

FINIS.

Robert Laurie

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